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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term 1971
No. 68-5027

EARNEST JAMES AIKENS, JR.,

Petitioner,

vs.

STATE OF CALIFORNIA,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of California

RESPONDENT'S BRIEF

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SUBJECT INDEX

	Page
Question Presented	1
Statement of the Case	1
A. History of the Case	1
B. Evidence Received at the Proceedings on the Issue of Petitioner's Guilt	5
1. The Murder of Kathleen Nell Dodd	5
2. The Murder of Mary Winifred Eaton	7
3. Statements and Conduct of Petitioner Implicating Him in the Dodd and Eaton Murders	9
C. Evidence Received at the Proceedings on the Issue of Penalty	19
1. The Murder of Clyde J. Hardaway	19
2. Other Felonious Conduct by Petitioner: Burglaries, Attempted Rape, and Assault With Intent to Commit Rape	22
3. Psychiatric and Psychological Evidence	24
4. Defense Evidence Related to Petitioner's Background	26
5. Findings of the Trial Court in Fixing the Punishment at Death	29
Summary of Argument	34
Argument	38

Page

Petitioner's Sentence of Death and Pending Execution, Resulting From His Conviction of First Degree Murder, Do Not Comprise Cruel and Unusual Punishment 38

A. Execution Is a Form of Punishment Expressly Recognized by Provisions of the Constitution and Upheld as Constitutional in a Long Line of Decisions by This Court 38

B. Capital Punishment Is Widely Accepted and Used in American Society and Comports With Contemporary "Standards of Decency" 51

C. In View of Petitioner's Inability to Make a Clear Showing That the Death Penalty Serves No Legitimate Function, the Federal Constitution Leaves the People of the State of California Free to Determine Through Their Elected Representatives That the Protection of Society Under Present Conditions Requires Death as a Form of Punishment for Certain Serious Offenses 71

D. The Death Penalty Is Not Arbitrarily or Discriminatorily Imposed Upon Racial Minorities, the Poor, or the Uneducated in California; Prisoners Under Sentence of Death Constitute a Representative Cross-Section of California's Criminal Population 103

E. Death Is Not a Cruel and Unusual Punishment for Petitioner, the Unrepentant

Page

Perpetrator of Three Known, Separate Murders Committed for Pecuniary Gain and Sexual Gratification 114

Conclusion 117

Appendix. Defendants Under Sentence of Death Reviewed by the California Supreme Court, 1965-1971 ..... App. p. 1

TABLE INDEX

Page

Table A Public Opinion Polls on the Death Penalty: California—United States 56

Table B December 1970 Illinois Referendum on Whether to Abolish the Death Penalty 57

Table C Number of Prisoners Received in Prison Under Death Sentence 64

Table D Los Angeles Police Department Study of the Deterrent Effect of the Death Penalty, February, 1971 87

Table E Homicides in California Prisons, 1965-1971, Committed by Adult Felons 99

Table F Race and the Imposition of the Death Penalty in California 105

Table G Race and the Commutation of Death Sentences in California 1959-1971 108

Table H Defendants Under Sentence of Death Reviewed by the California Supreme Court, 1965-1971 .....App. p. 1

TABLE OF AUTHORITIES CITED

Cases	Page
Aikens v. California, cert. granted, ... U.S. ....., 91 S. Ct. 2280	1, 4
Coolidge v. New Hampshire, ... U.S. ....., 91 S. Ct. 2022	71
Francis v. Resweber, 329 U.S. 459	46, 50
In re Anderson, 69 Cal. 2d 613, 447 P.2d 117 (1968)	50, 70
In re Cathey, 55 Cal. 2d 679, 361 P.2d 426 (1961)	96
In re Kemmler, 136 U.S. 436	39, 45, 50
In re Morse, 70 Cal. 2d 702, 452 P.2d 601 (1969)	100
In re Seiterle, 61 Cal. 2d 61, 394 P.2d 556 (1964), cert. denied, 379 U.S. 992	68
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Maxwell v. Bishop, 398 F.2d 138 (8th Cir. 1968), vac'd, 398 U.S. 262	77, 117
McGautha v. California, 402 U.S. 183	38, 42, 52, 63, 71, 75, 112, 118
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People v. Aikens, 70 Cal. 2d 369, 450 P.2d 258 (1969)	4
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Page

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People v. Friend, 47 Cal. 2d 749, 306 P.2d 463 (1957) 75

People v. Gilbert, 63 Cal. 2d 690, 408 P.2d 365 (1965), vac'd, 388 U.S. 263 ..... 96, 97

People v. Goodridge, 70 Cal. 2d 824, 452 P.2d 637 (1969) 63, 67

People v. Hall, 199 Cal. 451, 249 P. 859 (1926) 97

People v. Jensen, 43 Cal. 2d 572, 275 P.2d 25 (1954) 96, 97

People v. Love, 56 Cal. 2d 720, 336 P.2d 33 (1961) 62, 80, 85, 91, 92, 93, 101, 118

People v. Morse, 60 Cal. 2d 631, 388 P.2d 33 (1964) 66, 100

People v. Morse, 70 Cal. 2d 711, 452 P.2d 607 (1969), cert. denied, 397 U.S. 944 100

People v. Mutch, 4 Cal. 3d 389, 482 P.2d 633 (1971) 74

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People v. Purvis, 52 Cal. 2d 871, 346 P.2d 22 (1959) 96

People v. Robinson, 61 Cal. 2d 373, 392 P.2d 970 (1964) 67

People v. Robles, 2 Cal. 3d 205, 466 P.2d 710 (1970) 96

Page

People v. St. Martin, 1 Cal. 3d 524, 463 P.2d 390 (1970) 96

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People v. Seiterle, 65 Cal. 2d 333, 420 P.2d 217 (1966), cert. denied, 387 U.S. 912 68

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People v. Terry, 57 Cal. 2d 538, 370 P.2d 985 (1962), cert. denied, 375 U.S. 960 68

People v. Terry, 61 Cal. 2d 137, 390 P.2d 381 (1964), cert. denied, 379 U.S. 866 68

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People v. Vaughn, 71 Cal. 2d 406, 455 P.2d 122 (1969) 96

Powell v. Texas, 392 U.S. 514 ..... 49, 72, 75, 93, 95, 102

Robinson v. California, 370 U.S. 660 ..... 49, 51

Robinson v. United States, 324 U.S. 282 92

Rudolph v. Alabama, 375 U.S. 889 76

Seiterle v. Superior Court, 57 Cal. 2d 397, 369 P. 2d 697 (1962) 68

Stein v. New York, 346 U.S. 156 113

Spencer v. Texas, 385 U.S. 554 118

Trop v. Dulles, 356 U.S. 86 ..... 35, 40, 47, 48, 51, 52, 54, 63, 70, 76

Page

United States ex rel. Townsend v. Twomey, 322 F. Supp. 158 (N.D. Ill. 1971) 68

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Weems v. United States, 217 U.S. 349 .....41, 45, 46 .....48, 51, 71

Wilkerson v. Utah, 99 U.S. 130 .....44, 50

Williams v. New York, 337 U.S. 241 ..66, 75, 76, 113

Williams v. Oklahoma, 358 U.S. 576 48

Winston v. United States, 172 U.S. 303 75

Witherspoon v. Illinois, 391 U.S. 510 .....55, 66

Statutes

Act of April 30, 1790, ch. 9, §§ 1, 3, 8, 14, 33, 1 Stat. 112 43

Act of April 2, 1792, ch. 16, § 19, 1 Stat. 246 43

Cal. Code Civ. Proc. § 170.6 2

Cal. Mil. & Vet. Code § 1670 73

Cal. Mil. & Vet. Code § 1672(a) 73

Cal. Pen. Code:

§ 37 73

§ 128 73

§ 187 .....2, 3

§ 188 3

§ 189 3

§ 190 .....3, 73

§ 190.1 .....3, 4, 103

§ 209 .....73, 74, 95

§ 213 90

§ 219 73

§ 461 90

Page

§ 671 90
§§ 1026-27 103
§ 1181(6)(7) 113
§ 1193 ..... 4, 69
§ 1227 69
§ 1239 67
§ 1239(b) 4, 113
§§ 1368-70 103
§ 3046 ..... 95, 99
§ 3604 4
§§ 3700-06 103
§ 4500 73
§§ 4800-06 103
§ 4801 113
§ 4812 113
§ 12310 ..... 62, 73
18 U.S.C. § 1751 62
49 U.S.C. § 1472(i) 62

Constitutions

Cal. Const. Art. I, § 6 44
Cal. Const. Art. V, § 8 95
U.S. Const. Art. I, § 9 39
U.S. Const. Art. II, § 2 38
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U.S. Const. Amend. V 34, 39
U.S. Const. Amend. VIII ....34, 40, 41, 42, 43, 44, 45 .....46, 47, 48, 49, 50, 65, 70, 102, 117
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Page

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Page

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Page

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Part II, p. 6 (May 26, 1967) 111

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Part I, p. 1 (Aug. 8, 1970) 97

Part I, p. 3 (Jan. 31, 1971) 98

Part I, pp. 1, 3 (June 23, 1971) 59, 92

Part I, p. 15 (Aug. 12, 1971) 65

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Part I, p. 1 (Sept. 14, 1971) 98

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RESPONDENT'S BRIEF

QUESTION PRESENTED

The petition for writ of certiorari was granted limited to the following question:

> " 'Does the imposition and carrying out of the death penalty in this case constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments?' "[1]

STATEMENT OF THE CASE

A. History of the Case

In an indictment returned by the Grand Jury of Ventura County, State of California, on April 30, 1965, petitioner was charged with the murder of Mary Wini-

[1] .... U.S. ...., 91 S. Ct. 2280.

fred Eaton on April 26, 1965, a violation of California Penal Code section 187. [R., Cl. Tr. I, p. 1.][2] The same grand jury on August 13, 1965, indicted petitioner for a second violation of the same provision, the murder of Kathleen Nell Dodd on April 4, 1962. [R., Cl. Tr. III, p. 1.]

In each case two attorneys were appointed to represent petitioner. [R., Cl. Tr. I, pp. 4, 6; Cl. Tr. III, p. 3.] On motion of defense counsel the court ordered that $750 might be expended by said counsel for investigation purposes, $350 for employment of a psychiatrist, and $750 for an electroencephalographer. [R., Cl. Tr. I, pp. 6, 20; Cl. Tr. III, p. 19.] Petitioner's motions for discovery of the prosecution's evidence were also granted. [R., Cl. Tr. III, p. 19; Cl. Tr. II, p. 115.]

Petitioner pleaded not guilty to each charge, and the two cases were consolidated for trial. [R., Cl. Tr. I, pp. 21, 54; Cl. Tr. II, p. 8.] Petitioner then exercised his right under California law[3] to disqualify the judge to whom the case was initially assigned for trial. [R., Cl. Tr. III, pp. 43-44.] Thereafter on three occasions petitioner personally, both his counsel, and the prosecuting attorney waived trial by jury. [R., Cl. Tr. I, pp. 72, 77, 96-100, 109-13; Cl. Tr. II, p. 115.]

After presentation of the evidence on the issue of guilt and extensive arguments thereon, the court found

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[2]References are to the record in the state proceedings. Pending is a motion filed by respondent, with petitioner's acquiescence, requesting that the Court consider this case upon the original record and dispense with the printing of an appendix, since the record comprises several thousand pages. The designations *Cl. Tr. I and II* refer to the two volumes of clerk's transcript in case CR 5527 and the designation *Cl. Tr. III* to the single volume of clerk's transcript in case CR 5705.

[3]Cal. Code Civ. Proc. § 170.6.

petitioner guilty of murder[4] as charged in both indictments and found the offenses to be in the first degree.[5] [R., Cl. Tr. II, p. 209.]

During the course of the further proceedings which took place on the issue of penalty,[6] a difference of opinion arose between petitioner and his counsel[7] as to whether petitioner should take the stand in his own behalf, and the trial court appointed a third attorney for the limited purpose of advising petitioner of his rights and the consequences of taking the stand. After consultation with counsel, and a day's deliberation, petitioner chose to abide by the advice of counsel not to testify. [R., Cl. Tr. II, pp. 269-70.]

After presentation of the evidence on the issue of penalty and extensive argument thereon by counsel (and by petitioner personally, by leave of the court), the court fixed the penalty at death on the Eaton murder. [R., Cl. Tr. II, pp. 274, 296.] After argument on petitioner's motions for new trial or for reduction of punishment, including argument by petitioner person-

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[4]Until its amendment in 1970 to include feticide, California Penal Code section 187 provided: "Murder is the unlawful killing of a human being, with malice aforethought." Malice is defined in California Penal Code section 188.

[5]Premediated and deliberate murder, as well as murder committed in the perpetration of certain felonies (*e.g.*, robbery, burglary, or rape), is murder in the first degree. Cal. Pen. Code § 189.

[6]First degree murder is punishable in California in the alternative by death or life imprisonment, at the discretion of the trier of fact, while second degree murder is punishable by imprisonment from five years to life. Cal. Pen. Code § 190. California provides for bifurcated proceedings on the issues of guilt and penalty in capital cases. Cal. Pen. Code § 190.1.

[7]One of petitioner's two appointed attorneys became ill during the course of the penalty proceedings, which continued in his absence at the request of petitioner's other attorney. [R., Cl. Tr. II, p. 244.]

ally, said motions were denied by the trial court. [R., Cl. Tr. II, p. 299.] On April 7, 1966, petitioner was sentenced to death[8] on the Eaton murder and to life imprisonment on the Dodd murder,[9] the sentences being ordered to run concurrently. [R., Cl. Tr. II, p. 300; Cl. Tr. III, pp. 134-35.]

Petitioner filed notice of appeal from the judgment imposing the punishment of life imprisonment. [R., Cl. Tr. III, p. 137.] Appeal to the California Supreme Court from a judgment imposing the death penalty is automatic under California law.[10] On February 18, 1969, the California Supreme Court, in a unanimous opinion written by Justice Peters, affirmed the judgment in its entirety. *People v. Aikens*, 70 Cal. 2d 369 [450 P. 2d 258] (1969). On March 25, 1969, the trial court fixed June 4, 1969, as the date for petitioner's execution.[11]

Justice Douglas extended the time for filing a petition for writ of certiorari until May 30, 1969, and on May 23, 1969, stayed petitioner's execution. The petition was filed on May 29, 1969, and, with petitioner's motion for leave to proceed in forma pauperis, was granted on June 28, 1971.[12]

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[8]California Penal Code section 3604 provides: "The punishment of death shall be inflicted by the administration of a lethal gas."

[9]California Penal Code section 190.1 provides in part: "The death penalty shall not be imposed, however, upon any person who was under the age of 18 years at the time of the commission of the crime." The record (reporter's transcript, references to which are cited herein as *R.*) indicates that petitioner's age was several days under 17 years at the time of the Dodd murder, and 20 years at the time of the Eaton murder. [R. 4474.]

[10]Cal. Pen. Code § 1239(b).

[11]See Cal. Pen. Code § 1193.

[12].... U.S. ...., 91 S. Ct. 2280.

B. Evidence Received at the Proceedings on the Issue of Petitioner's Guilt

1. The Murder of Kathleen Nell Dodd

In April of 1962 Kathleen Nell Dodd, a 25-year-old Caucasian woman, lived in the City of Ventura, California, with her husband, Ventura County Deputy Sheriff Robert Dodd, and their two daughters, aged three and one. [R. 57-58, 61, 88, 2860, 2882.] Mrs. Dodd was five months pregnant at that time. [R. 127.] Mrs. Dodd had expressed concern over the type of neighborhood in which she lived. Shortly before her death, a two- to three-foot length of pipe was thrown through her front window while her husband was away at work, and during the week or two preceding her death she had observed a brown Dodge or Chevrolet parked nightly near her residence between midnight and 5:00 a.m. She always locked her doors and before opening them always ascertained the identity of her visitors even when their arrival was expected. She had even told a neighbor that in the event a criminal were to intrude into her house, she would run outside in order to lead him away from her children. [R. 59, 2001-02, 2006, 2021-22.]

At 6:30 p.m. on April 3, 1962, Deputy Dodd left to attend his evening college classes. [R. 62.] About midnight Mrs. Clair McWilliams, a resident in the area, was awakened by "a very high, shrill, prolonged scream. It had a very unearthly sound to it." She ran to the driveway on the adjoining property and observed a figure running toward the gate of the patio in a rapid zig-zag motion. She also heard the sound of twigs crackling to her left. As Mrs. McWilliams approached with her 17-year-old son, who was armed with a rifle, and her small dog, she realized that the figure was that of

a woman, from whom a steady stream of blood was flowing, emitting the sound of a running faucet. The blood-covered body immediately collapsed, and the woman, later identified as Mrs. Dodd, appeared to be dead. [R. 24-33, 54.]

Upon his return to the Dodd residence at 1:30 a.m. after visiting some friends, Deputy Dodd had noticed that the back door was unlocked; the television was on; the two little girls were asleep, but Mrs. Dodd was absent. Wet stains which he noticed on the floor, the coffee table, and two chairs appeared to be tea stains. Sixty dollars from a drawer, and a knife normally in a kitchen knife rack, were missing. After several telephone calls to various friends to ascertain the whereabouts of his wife, Deputy Dodd contacted the Ventura Police Department. [R. 62-64, 67-68, 72, 80, 83, 85.]

Police inspection of the neighborhood disclosed the following. Marks in the driveway where Mrs. Dodd's body was found were indicative of a struggle. A pack of matches and a package of Salem cigarettes (a brand smoked by both Mrs. Dodd and petitioner) were found in this area. A trail of blood led from them to the location of the body. Across from the driveway in a grassy area were signs of a person's having crawled along the ground. [R. 92, 140, 154-55, 1321-22, 1491.]

On a railroad embankment about 600 feet from the Dodd home, the police found the missing knife belonging to the Dodds, a pair of panties, and Mrs. Dodd's eyeglasses. An indentation in the soil suggested that a person had been sitting or lying with his head at the top of the embankment, and further down another indentation suggested the former presence of a kneeling

person. Other marks indicated that someone had gone up the side of the embankment and slipped backward. [R. 83, 86, 142-43, 148-49, 153.]

The autopsy performed on Mrs. Dodd's remains disclosed several knife wounds in the neck penetrating the carotid artery, the thyroid, and the voice box, causing extensive hemorrhaging. There were also pressure mark abrasions on the neck, bruises on the arms and legs, and knife wounds on one arm and three fingers and in the chest, one of the lungs, the abdomen, the liver, and the back. The autopsy verified the presence of a 5-month-old male fetus and in the vaginal area the presence of sperm and acid phosphatase, a chemical substance produced by the male sexual organs. In the opinion of the pathologist, sexual intercourse had occurred no longer than two to three days prior to death. [R. 180-205, 210, 215-16, 677.] Deputy Dodd last had sexual intercourse with his wife about nine days prior to her death. [R. 125.] Soil deposited in the crease between the deceased's buttocks was similar in type to that found on the railroad embankment. [R. 217, 616-19, 677-78.]

2. The Murder of Mary Winifred Eaton

In April of 1965 Mary Winifred Eaton, a Caucasian woman in her sixties, lived with her husband Frank Eaton in the City of Ventura, California, with their adopted children, Eddie Eaton and Susan Mann, and Susan's husband, David Mann. [R. 1128-A, 1740-41, 1802-03, 2860.] On April 26, 1965, Mr. Eaton left for work at 7:35 a.m. and Susan, David, and Eddie left the house at 8:20 a.m. [R. 848, 1741.] At that time Mrs. Eaton told Susan that she was going to wax the floors, as she apparently began to do later in the morn-

ing. [R. 1742, 1749-50.] A commercial census taker who had previously known Mrs. Eaton received no answer upon knocking at the Eaton residence at 10:00 a.m. but did speak to Mrs. Eaton on a second visit that morning between 11:00 and 11:30. No witness testified to seeing her alive after that hour. [R. 771-75.]

Upon returning home about 3:40 p.m., Susan and David were greeted by petitioner from across the street. [R. 1742-43.] Mr. Eaton returned home about 5:00 p.m. [R. 849-50.] The Eaton family became concerned when Mrs. Eaton did not return, and they began a search of the house. Her automobile was in the garage, and a door between two adjoining garages, usually kept closed, was open. [R. 857-59.] Money was missing from a grocery purse, and a vacuum cleaner was overturned. [R. 852, 856-57, 1746, 1763-65.] At 6:45 p.m. Mrs. Eaton's body, initially overlooked because it was mostly covered with bedding, was discovered by her husband in Eddie's bedroom. [R. 861.]

Mrs. Eaton's hands were bound behind her with a belt, and another belt was tied around her neck. [R. 902-04, 1358-59.] An autopsy revealed that a knife, apparently taken from a drawer in the Eaton residence, had been used to stab her repeatedly; the major cause of death was hemorrhage and shock caused by a large wound in the neck severing the jugular vein and the trachea and reaching the spine. Other knife wounds were located in the back of the neck and the chest, with five entries into the heart. A vaginal smear taken from Mrs. Eaton disclosed the presence of sperm and seminal fluid. [R. 1631-38, 1643-46, 1649, 1662, 1807, 1834, 1839.] Mrs. Eaton had last had sexual relations with her husband seven days prior to her death, and

apparently he was physiologically incapable of producing sperm. [R. 867, 1596.]

Mrs. Eaton's body had been partially covered with bedding, and an attempt had been made by her assailant to remove blood from the knife prior to replacing it in the kitchen drawer. [R. 861, 1288-89, 1839.] Two purses were found near her body. [R. 862-63.]

3. Statements and Conduct of Petitioner Implicating Him in the Dodd and Eaton Murders

On August 25, 1961, petitioner, a Negro, was delivered to the Southern Reception Center of the California Youth Authority at Norwalk; he was transferred to the Preston School of Industry on October 10, 1961, and paroled on March 12, 1962. [R. 1966-67, 2850.]

On March 27, 1962, petitioner's mother, Mrs. Liller Lewis, purchased a brown and tan 1953 Chevrolet from McMonica Motors. Thereafter petitioner stopped by the agency frequently; he was driving the vehicle. [R. 2432-37, 2479-81.]

On April 3, 1962, petitioner asked Mike Dixon to drive him home from the residence of a friend named Carter. When Dixon refused, petitioner pulled a knife on him, but Dixon viewed the incident as a joke, and he and Thomas Chambers drove petitioner home about 11:00 p.m. Petitioner told Dixon that he had a date with a "white woman" that evening. [R. 495-99, 508-09, 512-13.] Three or four days earlier petitioner had spoken to Chambers about a "white woman" and had stated that "she had a good pussy." [R. 238.]

Dixon saw petitioner at police headquarters on the morning after the Dodd murder, at which time petitioner related that he was being held on suspicion of

having killed Mrs. Dodd. [R. 502-03.] On the following day, at Carter's house, petitioner told Dixon, "'I killed the Dodd woman'" because "'[s]he was going to cut me loose.'" Asked about a scratch on his face that had not been there the evening before, petitioner replied, "'Nothin' but that good lovin'.'" When petitioner removed his shirt while washing an automobile, scratches on his back were apparent. Asked about them, he reiterated his previous remark. [R. 503, 505-07.]

However, on the evening after the Dodd murder Chambers had seen petitioner at Carter's house and had asked him about the scratch on petitioner's face. Petitioner replied that Ida Spellman, a policewoman, had slapped him (which in her testimony she denied). [R. 240-41, 607-08.] Two or three days later petitioner told Dixon, as well as petitioner's parole officer, that he had scratched his face on a nail in a garage. [R. 241, 601, 605.] When Dixon and Carter confronted him with his inconsistent explanations concerning the scratch, petitioner said he did not wish to discuss the matter. About this time petitioner was present when the Dodd murder was discussed and said he did not want to hear about it. Petitioner had money at this time, and four or five days after the Dodd murder he apparently lost $75 or $80 gambling. [R. 241-43.]

Three months after the murder, Deputy Dodd saw petitioner at the booking office of the Ventura County Jail. At that time Deputy Dodd was not investigating any crime involving petitioner, nor did he interrogate him. Petitioner initiated a conversation and asked Deputy Dodd if he was the deputy sheriff whose wife had recently been killed. When Deputy Dodd replied affirmatively, petitioner declared, "'It must have been a

pretty bad guy that would do something like that.'" [R. 87-89, 92.]

On July 19, 1962, petitioner was returned to the custody of the Youth Authority at the Preston School of Industry and transferred to the Southern Reception Center on September 28, 1962. He was paroled on December 20, 1962, only to be returned to the Southern Reception Center on February 20, 1963, and transferred to the Youth Training School at Ontario, California, on March 1, 1963. Paroled again on January 16, 1964, petitioner was returned to the Southern Reception Center on March 30, 1964, apparently on a charge of assault and battery, and transferred to the Youth Training School on April 20, 1964. [R. 1375, 1966-67.]

During these periods of custody he made the following incriminating statements to other inmates.

In July of 1962, Barney White met petitioner in the Ventura County Juvenile Hall. The two of them observed Deputy Dodd and shortly thereafter petitioner told White that when he was burglarizing the Dodd house, Mrs. Dodd had tried to get him to leave; he had picked up a knife, chased her outside through a field near the railroad tracks, and raped and killed her, leaving the knife near the tracks. [R. 453-56.]

About the same time, petitioner pointed out Deputy Dodd to another inmate as the deputy whose wife had been killed, and told the inmate, Bennie Rochester, that petitioner had killed her. Subsequently, petitioner said he "was just kidding," and upon encountering Rochester shortly before the present trial, three years later, petitioner told him he was "going to get" him. [R. 468-71.]

At the Preston School of Industry, petitioner approached Gene Noreen, who was reading a comic book. Petitioner was "bragging" about "raping" and "killing" a "'sheriff's wife.'" [R. 427-28, 434, 440.] He related that he had gone up to her house and knocked, that she opened the door a bit, then tried to close it; he forced his way in and tried to rape her, but she scratched him. He related tearing off Mrs. Dodd's clothes, chasing her, and cutting her up. [R. 432, 442-44.] Petitioner had a knife, which he kept sharpened, during his stay at the institution. [R. 433.]

Richard Carreiro knew petitioner at Preston in 1962. Petitioner told him he had gotten into an argument with a "white girl" and had killed her. In 1963 the two inmates saw each other at the Youth Training School, where petitioner repeated his statement, and possibly said he was "going with" her; he said he "[s]lapped her around, she started running. He was chasing her through back ways, caught her in the yard and stabbed her" "a lot." [R. 474-77, 484.]

On February 26, 1965, petitioner was paroled from the Youth Training School. [R. 1966-67.]

During the second week of April, 1965, petitioner showed up at the office of Inspector King, Chief of Detectives of the Ventura Police Department, and told him that he had information on narcotics and wanted to work as a narcotics agent. Inspector King said he would discuss the matter in the event petitioner produced some reliable information. When petitioner appeared at Inspector King's office a week later and claimed to be broke, King gave him $2 of King's own money. [R. 1399-1401.] During this period another officer gave $1 of his own money to petitioner when he

showed up at the station claiming he was short of money. [R. 621-22.]

On April 13, 1965, thirteen days prior to the rape-murder of Mrs. Eaton, the county health department tested petitioner, found him to have gonorrhea, treated him, and told him to return monthly for blood tests. [R. 1939-41.]

Petitioner was an acquaintance of Eddie Eaton and had been inside the Eaton residence on five occasions. Mr. Eaton described him as a "rather sharp boy" who "knows what he sees," and who "could do almost anything if he decided to really do it"; a person "having lots of ability" but not always truthful. [R. 886-90, 1803-06.]

On the Saturday night preceding Mrs. Eaton's death, petitioner and some acquaintances went to Michael Lawthorn's house. When the conversation turned to girls, petitioner remarked that he knew quite a few, that he had been out with Caucasian girls, and "that they were a nice piece of ass." [R. 345-49.] On the following evening petitioner advised Lawthorn on the subject of "how to make girls hot." [R. 352.] Petitioner also attempted to listen through the wall to a "young couple that lived next door, . . . getting ready to go to bed," and proposed a scheme to take photographs of persons through their windows at night and blackmail these individuals. [R. 354-55.]

On April 26, 1965, petitioner was seen in the general neighborhood of the Eaton residence by various witnesses — at 10:30 a.m., before 11:00 a.m., around 11:00 a.m., and at 11:30 a.m. [R. 722-23, 763, 2376-77, 2381-82, 2396-97.] About noon, petitioner asked Mr. and Mrs. Ira Shinavar, who lived approx-

imately across the street from the Eatons, whether there was any work for him to do. Petitioner was offered a dollar to catch a gopher under their lawn. Petitioner replied, " 'Well, I just got to see about getting me some work,' " and walked across the street to the house of Mrs. Catherine Lopez. [R. 801-05.]

Mrs. Lopez, who was not fully dressed, heard a man say "hello," thought it was her son-in-law, and was surprised upon looking up to see petitioner through the screen door. He was giggling and, when asked what he wanted, asked if he could cut her lawn. As he spoke to her, he jiggled the doorknob. Mrs. Lopez declined his offer, and he walked toward the corner house where Mrs. Eaton resided. She placed the time of his departure shortly before 12:27 p.m., because she placed a telephone call in order to check on the time so she would not miss the 1:00 p.m. bus. [R. 649-54.]

Some time prior to 1:00 p.m., petitioner returned to the Shinavars with a cultivator and some wire to use in catching the gopher, a task which he unsuccessfully attempted for a few minutes. Mr. Shinavar said petitioner had been gone 35-40 minutes between the two times that Mr. Shinavar had seen him. Petitioner related that he had "scrounged" the cultivator and the wire "on the corner" (the residence of the Eatons, to whom the implement belonged) and that no one was home. Petitioner then left the Shinavars and walked to his home, where he was met by his parole officer, Mr. Eugene Ansell, at 1:10 p.m. [R. 806-09, 817, 865-66, 885-86, 906-07, 1372.] That afternoon he told Mr. Ansell, " 'It seems like every time things start to go well for me something happens to mess it up.' " [R. 1383.]

Later that day petitioner persuaded a friend, Willie Tenner, to drive him to Pasadena, in Los Angeles County. Petitioner, who had not had enough money for bus fare that morning, purchased some perfume, went to buy a pair of shoes, paid $5 for gas, and purchased a six-pack of beer. [R. 373-74, 760-63, 925-33, 1405.] They then proceeded to Pasadena to the home of a girl known by petitioner and spent the evening with some girls, during which petitioner bought cigarettes and a bottle of vodka for Tenner, cigarettes, soft drinks, bread, and popcorn for the mother of one of the girls, four phonograph records, and more beer. [R. 933-39, 1024-25, 1030-31.]

Petitioner tried to slip a silver ring on the finger of Anita Jones, but she refused it, telling him to give it to his girl friend Corina Franklin (who was only two days from giving birth). When she asked where he obtained it, he said never mind where. Petitioner showed two rings, subsequently identified as Mrs. Eaton's wedding band and engagement ring, to Margaret Knowles and told her he planned to give them to Corina. He told her he had purchased the rings. Petitioner visited Corina on a date which she placed at April 26, 1965. He stayed at her house occasionally and kept some of his clothes there. He showed her Mrs. Eaton's two rings. The wedding band fit her finger, but she was unable to remove it; the engagement ring was too small for her to wear. When Corina asked petitioner where he had obtained the rings, he at first ignored the question and then said he had a job as a fry cook in Ventura. When Corina's mother twice asked that same question, petitioner did not respond but indicated that he was singing at a night club and working as a fry cook. [R. 993-96, 1101-09, 1146, 1153, 1193.]

That same evening petitioner slipped Mrs. Eaton's engagement ring on the finger of Belinda Pickens, telling her that he hoped he had gotten the right size. He declined to tell her where he had obtained it. [R. 1021-23, 1026-29.] Thereafter petitioner, Belinda, and some of their friends drove into the mountains. When they parked, they "heard something," and petitioner took a long knife from under the car seat. [R. 1034-36.] Later that night petitioner and Belinda spent some time on a blanket in a park, where she declined his offer of sexual relations. [R. 1038-39.]

As petitioner and Tenner drove back to Ventura that night, petitioner said to him, " 'When I gets back to Ventura, the police will probably be waiting for me when I gets back. They will probably be settin' on my doorstep when I get to Ventura.' " [R. 947.]

Indeed, they were. As he walked up his driveway at 6:00 a.m. on April 27, 1965, petitioner noted the presence of police officers, who had awaited him there since 2:30 a.m. [R. 1251-53.] Petitioner inquired, " 'You guys looking for me?' ", and accompanied the officers to Inspector King's office, where he appeared very nervous, was unable to stop pacing, and expressed his impatience. [R. 1253-54.]

Two days later, while in custody, petitioner was informed by Inspector King that Mrs. Eaton's rings had been found and remarked, " 'Oh man, I've been had. Them damn rings.' " [R. 1431.] The rings, which Mrs. Eaton had been seen wearing the day before her death, had wax on them, possibly the type she was using on the floor, and a quantity of blood too small to type. [R. 1847-48, 2407-10.] Petitioner told Inspector King the following conflicting stories concerning Mrs.

Eaton's rings, which bore her initials and her husband's he had had them " 'for so goddamn long it's been pitiful' "; he " 'bought them from some cat . . . down on the corner, yesterday,' " and that when he obtained the cultivator from the Eaton residence he saw the rings " 'laying on the ground and I picked them up and stuck them in my pocket.' " [R. 1431-32, 1436, 1444.]

In early May petitioner told an inmate in the jail, David Luker, that he had "killed the woman . . . but he didn't rape her." [R. 1694-95, 1698.]

A cellmate of petitioner's, Bobby Williamson, testified to the following statements made to him by petitioner in late April or early May of 1965. Petitioner said he knew who killed Mrs. Eaton but that it was not he; that he had gone to her house to borrow some tools, saw the rings inside the open door, and took them. The only person he saw on the premises was "a boy leaving there with bloody gloves in his pocket." [R. 1125, 1128-A, 1129.]

With reference to Mrs. Dodd, petitioner told Williamson that he had been approached by two male Negroes, one of whom was "going with" her, and that they had asked him "did he want some pussy." Petitioner responded affirmatively, but when informed that they were referring to Mrs. Dodd, declined the offer because he "didn't want to get in any more trouble." Petitioner told Williamson that someone in a bar had approached him to tell him that Mrs. Dodd had been raped, killed, and "thrown out in an alley." Nonetheless, petitioner recounted that he might as well plead guilty since "the district attorney's office was going to railroad him anyway." [R. 1131-33.]

In June or July of 1965, petitioner showed Williamson his sexual organ and said he would show it to the doctor to demonstrate that, having gonorrhea, he could not have raped Mrs. Eaton. Petitioner also inquired whether Williamson thought "if he tried to act insane, would it do him any good," and Williamson said he "didn't think it would with the charge he had on him." [R. 1133-34.] On August 19, 1965, petitioner told Williamson, "if they didn't get him out of that county jail, he was going to kill someone else." [R. 1133.]

Near the end of October, 1965, petitioner told Lieutenant Urias of the Ventura Police Department that one of his fellow inmates, Sam Waldron, had made statements indicating the inmate's involvement in the Dodd murder. Petitioner also told Urias, " 'Well, look, I'm a marked man. . . . And now a story about some rings. I'm doomed.' " [R. 1715, 1717, 1720-21.]

On November 8, 1965, at the jail, petitioner approached Deputy Sheriff Gary Markley and inquired when petitioner would get back his shoes. When told that they were in evidence, petitioner became excited and said, " 'Those weren't even the shoes I was wearing when I—' "; he then stopped himself, and his face went blank. [R. 1821-23.] On November 24, 1965, Deputy Sheriff Don Kent, who had custody over petitioner during the present trial, heard petitioner make the following statement during the course of the testimony of Mrs. McWilliams, the woman who found Mrs. Dodd's body: " 'She is saying things that only I know.' " While Deputy Dodd was testifying with reference to the amount of money in the drawer at the Dodd residence, petitioner told Deputy Kent: " 'He wouldn't know that unless someone told him.' " During the course of a recess later that day, petitioner asked Deputy Kent

on three occasions to ask Deputy Dodd who it was who had given him all his information. And with reference to Mrs. McWilliams and her son, who had approached Mrs. Dodd's body armed with a gun and in the company of a small dog, petitioner said, "'They were out there to kill me.'" [R. 1825-27.][18]

C. Evidence Received at the Proceedings on the Issue of Penalty

1. The Murder of Clyde J. Hardaway

On the morning of June 7, 1962, Edward Danner, an employee of the Park Department of the City of Pasadena, California, discovered a body, later identified as that of Clyde J. Hardaway, a male Negro in his forties, in a park located near Devil's Gate Dam. [R. 3424, 3481-83, 3865.] Mr. Danner attempted to rouse the man and, realizing that he was dead, summoned the police. [R. 3482, 3485.]

When the police turned the body over on its back, the penis was exposed through the fly of the pants. [R. 3881, 3883, 3929.] There was blood around the face and skull portions of the body. [R. 3879.] Automobile tracks were apparent near the body as well as two moist spots which, the officers concluded, were where two persons had urinated on the ground. [R. 3871, 3930.] An autopsy determined the cause of death to be hemorrhage and brain damage resulting from two gunshot wounds, in the left temple and the rear of the skull, with particles of burned gunpowder embedded in the area of the wounds. The fatal weapon, which ballistics tests showed might have been a derringer, was determined to have been fired in each instance

[18]The trial court's findings of fact on the issue of guilt appear at R. 3372-3419.

from less than four inches from the victim's head. There was also an abrasion on the victim's forehead and a contusion over one of his eyes, apparently caused by the assailant's dragging the body along the ground. [R. 3498-3501, 3512-16, 3528, 3921-23, 4229, 4236.] Laboratory analysis showed 0.15 percent alcohol in the deceased's blood, which would have made him a borderline drunk driver, and indicated the presence of blood and semen on the fly area of the boxer shorts worn by Mr. Hardaway at the time of his death. [R. 3519, 4177.]

Petitioner was identified as Hardaway's assailant through circumstantial evidence and his own statements.

On the night of his death the deceased, a homosexual, had been drinking heavily and had on his person $100-$200. He was planning to send money to his daughter in Texas, although it was also his habit to carry large sums of money on his person. [R. 3575-78.] That night a friend of his saw Hardaway talking to a young male Negro in Hardaway's automobile, and apparently saw Hardaway hand the person some money. [R. 3565-67.]

On the morning of June 8, 1962, the deceased's vehicle was found abandoned in Oxnard (a city adjacent to Ventura). Blood spots were observed on the outside of the vehicle. [R. 3854, 3857-59.]

On June 7, 1962, petitioner had purchased a used automobile in the City of Ventura, making a $107 cash down payment on the $132 vehicle. [R. 416.] That same day he was back in Pasadena giving Corina Franklin a ride in his new acquisition. When she asked him where he had obtained it, he replied, " 'None of

your business.'" [R. 3659-61.] That same day petitioner pulled out a gun and said he was going to shoot a dog that had been playfully chasing them. Corina's inquiry as to where petitioner had obtained the weapon met with the same response. [R. 3661-62, 3673-74.] The vehicle was later found abandoned on a Los Angeles street. [R. 4091-92.]

A gun having the same appearance as the one viewed by Corina, a derringer with white handles, had been stolen from Mr. Roy Young in Ventura on June 6, 1962, the day before Hardaway's body was found. The gun, which Mr. Young kept under the head of his bed, was taken when someone broke the window over his bed and entered while Mr. Young was at work. The theft took place one or two days after Mr. Young had shown the weapon to petitioner and let him fire it. [R. 3661, 3968-72, 3975, 4156-57.] Petitioner had told a friend, "'I got a little derringer.'" [R. 3896.] Petitioner's presence in Ventura on the day of the theft was established. [R. 4166-68.]

On June 11, 1962, a male Negro approximating petitioner's physical description, although described as about 22 years of age, pawned Mr. Hardaway's camera in Pasadena, signing petitioner's name, but never reclaimed the camera after a notification of the expiration of the pawn period was sent to 1950 Mentone Street, Pasadena, the former address of petitioner's half sister. [R. 3944-51, 4016-18, 4173, 4590, 4823.]

In June and July of 1962, petitioner volunteered to John Pena and Arthur Pena, in the juvenile tank of the Ventura County Jail, that petitioner had been picked up hitchhiking in Los Angeles by a "queer," went into the mountains with him, pulled out his derringer, made

him get down on his knees, and when "the guy bent down to blow him" shot him in the head a couple of times, killing him, taking his wallet, and using the money to buy an automobile. [R. 4024, 4026-27, 4029-31.]

Sometime in 1963 or 1964, at the correctional Youth Training School, petitioner volunteered to another inmate, Richard Carreiro, that he had shot a homosexual " 'blood' " (fellow Negro) in the head and killed him, that it was like "playing the part of the Deacon" (a hired gunman, portrayed on television, who made his victims kneel and then shot them in the forehead). [R. 3547-49, 3557.] At this institution petitioner showed a photograph of Mr. Hardaway's daughter, inscribed to Hardaway and taken from his wallet, to other inmates in the course of their showing each other their girl friends' pictures. [R. 3889-90, 3893.]

2. Other Felonious Conduct by Petitioner: Burglaries, Attempted Rape, and Assault With Intent to Commit Rape

On July 6, 1961, petitioner burglarized Scritchfield Motors in the City of Ventura. Petitioner broke several windows, entered the premises, and attempted to steal an automobile. Petitioner managed to elude a pursuing police officer who fired a shot at him. [R. 4201-04, 4243-44.]

Sometime during the summer of 1962 between 9:00 and 10:00 one evening, petitioner removed the screen and opened a window in Louise Gunn's house in the City of Ventura. Mrs. Gunn took her gun, "eased out" the back door, and observed petitioner, leveling the gun at him. He ran away and then proceeded to walk to his house, whistling. On the following day Mrs. Gunn spoke to petitioner and his mother about the in-

cident, and he "said something smart" to her. Mrs. Gunn told them that the only reason she did not shoot him was that she had known petitioner's mother for years, and that if he did it again petitioner would be killed. [R. 4094-98.] Within two weeks the gun was stolen from her house. [R. 4118.]

On Christmas Day of 1962, Dorothy Ann Piggee, then 15 years of age, met petitioner in the City of Pasadena. After spending some time with him and some friends, she accepted his offer to "walk me home and see that I got home safely." On the way, petitioner suddenly pulled her down. When she began to scream, he put his hand over her mouth and told her to "shut up or he would kill me." Petitioner then terrified her by placing a letter opener at her neck and tore off her underpants. In the victim's words, "he tried to have an intercourse with me, but he couldn't. . . . [H]e put his finger up there, and he broke my maidenhead," and bloody fluid was emitted from her sexual organ. Petitioner was unsuccessful in achieving entry with his sexual organ. He told her, " 'How would you feel, not having a girl for a year.' " She then ran home, with petitioner in pursuit, and complained to her mother, who decided to take her to the emergency hospital. Petitioner then came up to her mother and "told her that he had did it." [R. 4250-54, 4261, 4264, 4281-83.] The victim was medically treated for a tear in her hymenal ring. [R. 4123-24, 4129.]

Emory McMurray, Jr. had petitioner assist him in his commercial rubbish collection business. He directed petitioner to pick up some refuse from Mrs. Beverly Metcalf, but never from Mrs. Deborah Bunnell. [R. 4316-21.] On February 4, 1964, petitioner drove a truck to Mrs. Metcalf's residence and picked up the

trash. He asked Mrs. Metcalf how her husband was and whether they had a dog. Then he asked to use the bathroom. After hesitating, she gave him permission, and while he did so he left the bathroom door open. After returning to the trash receptacles outside, petitioner tried to re-enter through the back door, but it was locked. Mrs. Metcalf then denied his request to enter to use the telephone. [R. 4330, 4333-36, 4338-40.]

Less than an hour later, petitioner appeared at Mrs. Bunnell's house and asked to use the telephone, which she let him do. He chatted with her a few minutes, and then she suggested it might be time for him to return to work. Instead of going out the front door as she expected him to do, he sat down on a chair in the living room. She then repeated her suggestion, whereupon he got up, spun her around, grabbed her across the chest, and placed a hand over her mouth, dragging her some distance. She screamed and fought him, liberating herself and reaching the front door, and he finally obeyed her command to leave. Petitioner's shirt was filthy, and she found her face and shirt covered with black dirt. [R. 4330, 4362-71, 4378.] Her mouth was full of soot and dirt from petitioner's gloves. [R. 4380.] Mrs. Bunnel reported the incident to the police as an assault with intent to commit rape. [R. 4296-97.]

3. Psychiatric and Psychological Evidence

Three psychiatrists and one psychologist testified at the penalty proceedings, all having been called by the prosecution.

On March 20, 1957, Dr. Walter Streitel, a psychiatrist, examined petitioner at Juvenile Hall in Ventura. At that time, when petitioner was 11 years of

age, he had a history of "difficulties with the law." Dr. Streitel "found absolutely no indication of any psychotic manifestations"; petitioner "fitted most adequately in the category of a sociopathic personality disturbance." [R. 4049-52.] Dr. Streitel noted, "we haven't seen much benefit from all of the efforts made to rehabilitate this kind of a person." [R. 4053-54.] Petitioner's commission of the Eaton and Hardaway murders was "entirely consistent" with the foregoing diagnosis, and in conjunction with the commission of the Dodd murder led Dr. Streitel to conclude: "It is rather unlikely that rehabilitation could be expected." [R. 4056-63.]

On September 15, 1961, Dr. Stephen Howard made a psychological evaluation of petitioner at the Southern Reception Center and Clinic of the California Youth Authority. Dr. Howard concluded that petitioner was a person "of adult normal intelligence" with "strong underlying anger and aggression" and therefore "potentially dangerous." Dr. Howard "diagnosed him basically as an inadequate personality," finding that his character disorder was "entrenched" and that " 'the prognosis is poor' " for change in the future. [R. 4071-75.]

In 1963, at the Southern Reception Center and Clinic, Dr. Joseph Veich, a psychiatrist, examined petitioner and developed a history of his mental background. Dr. Veich concluded that petitioner was not a "sexual pervert or sadist" and that petitioner had no mental or emotional disorders. Dr. Veich did not find him to be a sociopath. Petitioner was mentally normal and did not give much indication of remorse. [R. 3474-78.]

In April of 1964, Dr. Veich again saw petitioner at the same institution and found his mental condition

unchanged—mentally normal and essentially healthy. [R. 3478-79.]

On April 27, 1965, Dr. Donald Patterson, a psychiatrist, examined petitioner at the Ventura Police Station. Petitioner showed no evidence of a psychotic reaction and was fully in contact with reality. Dr. Patterson's conclusion was "that he did not present a mental illness or psychosis, but that rather he presented evidence of a long-standing personality maladjustment . . . which in my opinion qualified me to diagnose him as presenting a sociopathic personality disturbance." [R. 4185-87, 4191-93.] Asked what the prospects for rehabilitation were for a man with petitioner's sociopathic personality difficulties, Dr. Patterson concluded, on the basis of petitioner's "long history of difficulties of an overt nature," "problems in the home situation," "his general attitude, which is one of tendency to deny responsibility, . . . the marked trend toward untruthfulness," and petitioner's tendency to blame the community for not understanding him and for treating him unfairly, that the "prospects . . . for helping this individual are extremely limited." [R. 4194-96.]

4. Defense Evidence Related to Petitioner's Background[14]

Petitioner's mother testified in his behalf. She was 59 years of age at the time of trial, was born in Louisiana, had little schooling, and claimed to be illiterate. She described her first marriage, at the age of 13, and a second marriage to a pastor, her move to California in 1930, her separation from her husband, and her move to Ventura in 1936. She had supported

[14]The defense evidence which purported to controvert petitioner's guilt of the charged offenses and certain of the collateral offenses was inconsequential and is therefore not summarized by respondent.

herself and her two daughters since then by doing day housework. [R. 4469-73.] After cohabiting with another man, she met a serviceman who fathered petitioner. However, Mrs. Lewis never married again, and shortly after petitioner's birth on April 18, 1945, she ceased seeing petitioner's father, who failed to continue supporting her or petitioner. A year after the birth of petitioner, his father ceased writing to Mrs. Lewis. Petitioner never saw his father thereafter. [R. 4474-77, 4480.]

She ceased doing housework at $1 an hour when welfare officials told her to stay home to care for petitioner and gave her $80 a month for support. [R. 4478-79.] Because she was illiterate she could not help petitioner with his school homework. [R. 4480.] She moved to $30-a-month federal housing, by which time her welfare had increased to $110, and she worked to bring in additional money. [R. 4481-82.]

Petitioner had trouble with the law and for about a year was placed in the custody of Thelma Calloway, a half sister who lived in Pasadena. [R. 4482-84.] Her testimony described this period in his life. [R. 4579-82.] Petitioner returned to Ventura to live with his mother. [R. 4485-87.] Thereafter petitioner did "o.k." in school and had no trouble there. He was under the supervision of a probation officer at the time. [R. 4488-89.] Petitioner also spent about a year in San Diego with his other half sister at this juncture in his life, thereafter again returning to his mother in Ventura. [R. 4489-90.] Petitioner went to school, was arrested, and was then committed to the Los Priestos School. Upon his release he continued his schooling in Ventura until he was again picked up and committed to Preston School. [R. 4490-93.] Shortly after his re-

lease in 1962, petitioner and his mother visited in Pasadena, where he was again committed, because of "something about a girl." [R. 4494-96.] Upon his release and return to his mother's house, he got a job for a couple of weeks wiping cars on a used-car lot. He also had occasional other work, including two or three weeks' work with the McMurray Trash Service. Thereafter petitioner was again committed to the California Youth Authority. Upon his release he returned to his mother's house and began to seek a job. At that point in time petitioner was arrested on the charge of murdering Mrs. Eaton. [R. 4498-4500.] At no time in petitioner's life "did any man act as a father for him." [R. 4501.]

On cross-examination Mrs. Lewis denied the truth of Mrs. Gunn's accusation that petitioner had broken into her house. Petitioner's mother denied knowing whether petitioner's step-sisters had sent him home to Ventura because he got into difficulties and they could not handle him. [R. 4502-03.] Mrs. Lewis also did not know whether petitioner had been in "serious trouble" prior to his eighth birthday. She had no recollection of a complaint from a Mrs. Kelso that petitioner had molested her little girl. [R. 4502-04.] Petitioner allegedly was committed to the Youth Authority on frequent occasions when he was innocent of any wrongdoing. [R. 4511.] Mrs. Lewis did remember that petitioner had once escaped from Juvenile Hall. [R. 4512.][15]

Petitioner's half-sister from Pasadena, Mrs. Callaway, was a clerical supervisor, had a college education,

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[15]Mrs. Lewis had also taken the stand at the proceedings on the issue of guilt, where she likewise testified to her hard-working schedule and cash subsidies to petitioner. [R. 2241, 2269, 2318-20, 2224.]

and was working toward a degree in sociology. [R. 4604.]

The defense also called four officers of the California Youth Authority, who testified that during his various periods of commitment petitioner appeared well-adjusted, obedient, agreeable, and generally cooperative. Petitioner was an especially good athlete and considered the "possibility of a future in collegiate athletics" since one or two colleges had made him an offer. [R. 4605-08, 4611-12, 4643-45, 4649-52, 4659-64.] However, during his confinement he was involved in instigating a fight, which caused a month's postponement of his parole. [R. 4654.] And one of the Youth Authority officers conceded, with respect to petitioner's various commitments, "I honestly don't feel that there was a great deal of rehabilitation done with [him]." [R. 4675.]

5. Findings of the Trial Court in Fixing the Punishment at Death

The Honorable Jerome H. Berenson, Judge of the Ventura Superior Court, made the following findings as trier of fact in fixing the punishment at the conclusion of the proceedings on the issue of penalty:

> "[F]undamental, as I see it, is the grave responsibility of the Court to weigh and to ponder the ultimate question, not only by a review of all of the past criminal record and conduct of this defendant, but also from as incisive an inquiry as possible into his background, his personal history, and his personality. In addition, in my opinion, it is essential that the Court should probe the possibility or probability or likelihood that, when and if such opportunity should at some time in the

future exist, the defendant would or might repeat and recommit crimes of extreme violence. And I must necessarily be concerned with whether or not there is a reasonable prospect of the rehabilitation of this individual.

"Earnest Aikens has since the age of eleven years of age, or thereabouts, been involved in an almost continuous pattern of anti-social and criminal behavior of one sort or another. He has graduated from petty and minor nuisances and offenses through more serious proceedings that have involved Juvenile Court wardship and a commitment to Los Priestos Boys' School and to more recent commitments at the Preston School of Industry and the Youth Training School, both administered by the California Youth Authority. In the instances of his parole from the Authority level, his periods of surcease from criminal behavior have been of short duration. Now he stands convicted of two brutal, cold-blooded and vicious killings, together with the finding that I have here earlier made of his responsibility for a third homicide. Interspersed with the foregoing have been instances of assault, rape and robbery. Such record, at the very least, demonstrates an indifferent, arrogant and obvious disregard for the dignity and value of human life and the rights of others.

"The question must then be asked as to what kind of person, now at the very threshold of his majority, would or could so conduct himself. Dr. Streitel, who examined the defendant when he was eleven years of age, reached the conclusion at that time that he then fitted into the category of a sociopathic personality disturbance. In response to Mr. Deem's hypothetical questions con-

cerning and pertaining to the facts of the Hardaway and the Eaton incidents, the doctor stated that the conduct there indicated was consistent with the diagnosis that he had made of the defendant several years before. According to this qualified psychiatrist a sociopath, despite the possibility of being a pleasant and charming person, has neither regard for the truth or for responsibility. He is self-centered, with little, if any, concern or respect for laws or rights of others, and because of his inability to learn from experience, he constitutes a potential threat of violent criminal conduct. Dr. Streitel expressed the opinion that we have not seen much benefit in the past from all of the efforts made to rehabilitate this kind of person." [R. 4986-88.]

Judge Berenson then reviewed the opinions of Dr. Howard and Dr. Patterson and continued,

"It has been suggested to this Court by counsel for the defendant in a most eloquent and moving plea in his behalf that Earnest Aikens should not be held here accountable alone for the terrible circumstances in which he now finds himself. Mr. Ashby would urge that he is but the product of an American tragedy, for which he is not fundamentally responsible. This encompasses a cold, unrelenting, a bleak and loveless environment, together with the frustrations of poverty and of rejection and, perhaps, of color—all of this part of a certain social and economic disorder of the day. Because of his growing up in this kind of frustrated existence, the defendant, as Mr. Ashby views the situation, should thus be understood as to the reasons for his emergence as a person who is

scornful, who is outraged and who feels alone in society. That this young man may well have been deprived of some of the environmental or other advantages that others have enjoyed cannot, of course, under any circumstances be denied, but I have gained the conviction in my efforts here to seek out the truth that he has been abundantly provided the opportunity to obtain an education without expense to himself or his family; that he has not gone hungry or ill-clothed; that he has been provided the chance to learn responsibility, self-respect, personal dignity and the benefits that may come to one who lives within the rules of society on the occasions when he lived and had the opportunity to be with his sisters in their homes, each of which persons to this Court, and from my observation of them they have impressed me with their demonstrated intelligence, a stability, a social adjustment, and an exemplary personal conduct; and beyond any question of doubt this defendant has had the constancy of a love and a loyalty given to him by a mother, too doting and protective, perhaps, at times, but who without education or material advantage to herself has sought by virtue of her own long and hard toil and labor to provide the defendant with a home, some respectability in the community, and some measure of economic assistance. Mrs. Liller Lewis is not, in my judgment, a person here to be condemned nor to be censured, but she is to be pitied.

"And I cannot avoid the observation that there are many, many persons with early backgrounds much worse, indeed, than that of this young man who have developed and lived as useful and

law-abiding citizens within their respective communities, and who by their own hard diligence, persistence and personal efforts have risen above a questionable environment to which they may have been exposed during their formative years. I cannot accept the premise that this defendant should be excused his conduct or that such should be deemed substantially mitigated in its seriousness because he has not had a father, or because his family has not been more wealthy, or for any of the other reasons that have here been expressed by his counsel.

"In my opinion, he has failed for lack of any apparent desire to help himself or to emulate those around him who have been honest, decent people. Nor does it appear to me, despite the opportunities that have been given to him for an effective rehabilitation, that he has made any real or conscientious effort to become so rehabilitated.

"Finally, I have without avail searched and sought for some indication in this defendant of remorse, of regret, of self-reproach for his acts, of any expressed repentance, or of contrition. It is worthy of note that although . . . [the Youth Authority officers] could speak of the social adjustment made and the athletic prowess demonstrated by the defendant while institutionalized, the record is completely barren from their testimony concerning any show of words or deeds of this young man evidencing any of the foregoing.

"No more awesome or lonely duty, I am sure, can be cast upon any individual than that which this Court is now required to discharge. In the final analysis I must reach a decision consistent

with the dictates of my mind and conscience and heart in accordance with the laws of this state and my responsibility as a judge. The Court seeks to be merciful, but also it must be just. That I feel a compassion and pity for a fellow human being so young in years is manifest. That I must also be sorely concerned with the multiple and aggravated crimes of this defendant against the victims here involved and, indeed, against society in general, is self evident. Against the background of these several considerations I cannot, nor do, reach any other conclusion or finding than that the penalty to be imposed should and must be death." [R. 4989-92.]

SUMMARY OF ARGUMENT.

The Fifth Amendment, ratified simultaneously with the Eighth Amendment in 1791, recognized in its express reference to "capital" offenses what had been implied in provisions of the Constitution as originally drafted, that death was among the forms of punishment available to the federal government. The fact that, in the period immediately preceding and following adoption of the Eighth Amendment, state and federal constitutional prohibitions against cruel and unusual punishment coexisted with state and federal enactments punishing a wide variety of offenses with death, is indicative of the intent of the Framers to bar only those punishments which are both cruel and unusual either in their inherent form or as grossly excessive in their application in relation to the seriousness of a particular criminal act. A long line of decisions by this Court confirms this view of the Eighth Amendment.

This Court's use of the words "evolving standards of decency that mark the progress of a maturing so-

ciety," concurrently with an express recognition of the continued constitutional validity of the death penalty,[16] did not sound a talismanic death knell of three hundred years of capital punishment in this country. The deep-rooted history of capital punishment in this country and in our cultural and religious heritage, and the widespread support for the death penalty among the majority of our population and in most segments of our society, disprove the assertion that the death penalty is a barbaric relic of the past. The failure of the almost annual efforts in the California Legislature to abolish the death penalty, and the concurrent expansion of the list of federal and state capital offenses, are indicative of the continuing recognition of the need for the death penalty as a protection for society.

Petitioner's preoccupation with the judicially-arrested rate of executions, as an alleged indicator of popular disfavor with the death penalty, ignores the reality that a much more accurate barometer of the "evolving standards of decency" is the constant number of defendants whom juries annually send to the nation's prison systems under sentence of death.

Most of petitioner's arguments could more properly be directed to a legislative body, and respondent is hard pressed to comprehend how a constitutional issue is raised by petitioner's claim that alternative remedies to capital punishment are available to the state and federal governments. Respondent does not view its task as encompassing conclusive proof of the social utility of capital punishment. The burden, if any, which respondent must assume is only to demonstrate that there

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[16] *Trop v. Dulles*, 356 U.S. 86, 99, 101 (plurality opinion of Warren, C.J.).

is in fact a basis upon which the California Legislature could reasonably conclude that certain serious offenses should be punishable by death.

There exist obvious flaws in the methodology of the theoretical studies upon which petitioner relies. On the other hand there are numerous graphic illustrations of the deterrent effect of the death penalty collected by respondent, as well as proof of the inadequacy of incapacitation by life imprisonment as protection of society. Thus petitioner has failed to make his case that no legitimate social aim can be furthered by imposition of the death penalty.

Hard figures from the files of the California State Prison at San Quentin and other sources put the lie to the frequently voiced myth that the death penalty is arbitrarily and discriminatorily imposed upon racial minorities, the poor, the uneducated, the mentally deficient, and the "friendless."

Finally, it is clear on the facts of the present case that death is not a cruel and unusual punishment for petitioner, the unrepentant perpetrator of three known separate murders committed for pecuniary gain and sexual gratification, as well as numerous other instances of violent felonious conduct. The psychiatric and psychological evidence is unanimous in establishing that petitioner had no mental disorder and in demonstrating that the likelihood of petitioner's being rehabilitated is very slight. The validity of this conclusion is further supported by petitioner's repeated incarcerations and failures at rehabilitation, and his statement, while awaiting trial on the present charges, to a fellow inmate, that he would kill someone else if he was not released from custody.

Respondent submits that nothing has happened in the 180-year history of the Constitution, or in the 300-year history of capital punishment in this nation, which can alter the fact of the Framers' contemplation of the death penalty as a form of punishment of necessity available to the States for the protection of society in a case such as the one at bar.

ARGUMENT

Petitioner's Sentence of Death and Pending Execution, Resulting From His Conviction of First Degree Murder, Do Not Comprise Cruel and Unusual Punishment

A. Execution Is a Form of Punishment Expressly Recognized by Provisions of the Constitution and Upheld as Constitutional in a Long Line of Decisions by This Court

The sole question before this Court, as set forth in its grant of certiorari, is: " 'Does the imposition and carrying out of the death penalty in this case constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments?"[17]

Justice Black defined the nature of the task presently facing the Court when he noted last Term with reference to procedural attacks on the death penalty:

> "The Constitution grants this Court no power to reverse convictions because of our personal beliefs . . . Our responsibility is rather to determine whether petitioners have been denied rights expressly or impliedly guaranteed by the Federal Constitution as written. . . ."
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> *McGautha v. California,* 402 U.S. 183, 225-26 (Black, J., concurring). *See also id.,* 195-96, 221-22.

The Constitution as originally[18] written contained only indirect allusions to capital punishment.[19]

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[17].... U.S. ...., 91 S. Ct. 2280.

[18]The Constitution was adopted by the Constitutional Convention in 1787 and ratified by the States in 1788. Legislative Reference Service, Library of Congress, Constitution of the United States of America 28-31 (Rev. Ann. ed. 1964).

[19]Two of the constitutional provisions suggest that the Framers of the original Constitution contemplated capital punishment as an available form of punishment. Article II, Section 2, gives the

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Among the Constitution's objectives, as set forth in the preamble, were to "establish justice, insure domestic tranquility, provide the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity." The specification of these objectives suggests that the Framers intended the new federal government to have the inherent power of all governments to decree whatever customary punishments for criminal conduct were deemed necessary "to protect the lives, liberties and property of its citizens," *In re Kemmler*, 136 U.S. 436, 449, absent particular prohibitions written into the Constitution.[20] Similarly three years later the Tenth Amendment recognized that powers not prohibited to the States (or delegated to the federal government) were reserved to the respective States or to the people.

The first ten Amendments to the Constitution were proposed by the First Congress and in turn ratified by the States in 1791. Among these the Fifth Amendment recognized expressly what had been implied in the aforementioned provisions of the original Constitution, that death was among the forms of punishment, for criminal conduct, available to the federal government. That Amendment contains the mandate that "No person

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President the "power to grant reprieves," the latter term being defined in Black's Law Dictionary 1466 (4th ed. 1951) as primarily "[t]he withdrawing of a sentence of death for an interval of time, whereby the execution is suspended," and secondarily as "the withdrawing of any sentence for a period of time." Article III, section 3, provides in part that "The Congress shall have power to declare the punishment of treason." The common punishment for treason in 1787, and a common one now in American jurisdictions retaining capital punishment, is death. Bedau, The Death Penalty in America 6, 43 (rev. ed. 1967).

[20]Compare the absolute prohibition against bills of attainder and ex post facto laws and the prohibition against suspension of the right to habeas corpus except in limited circumstances. Art. I, § 9.

shall be held to answer for a *capital*, or otherwise infamous crime, unless on a presentment or indictment of a grand jury" and further commands that no person "be twice put in jeopardy of *life*" without due process of law. (Emphasis supplied.) The same language from the due process provision was reenacted and made applicable to the States in 1868 by the Fourteenth Amendment.

It is in this context that one must evaluate the nebulous[21] provision of the Eighth Amendment that "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

One scholarly inquiry into the history of the Eighth Amendment casts doubt upon the precision with which the Amendment's framers selected the prohibition against "cruel and unusual punishments." Granucci, *"Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning*, 57 Calif. L. Rev. 839, 840-41 (n. 8) (1969).[22] The commentator, quoting from the

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[21]Chief Justice Warren's opinion in *Trop v. Dulles*, 356 U.S. 86, 100(n.32), stated: "Whether the word 'unusual' has any qualitative meaning different from 'cruel' is not clear. On the few occasions this Court has had to consider the meaning of the phrase, precise distinctions between cruelty and unusualness do not seem to have been drawn." Commentators have remarked of the Amendment that "many important points concerning its meaning, scope and application are still in doubt." Note, *The Effectiveness of the Eighth Amendment: An Appraisal of Cruel and Unusual Punishment*, 36 N.Y.U. L. Rev. 846 (1961).

[22]"The history of the writing of the first American bills of rights and constitutions simply does not bear out the presupposition that the process was a diligent or systematic one. Those documents, which we uncritically exalt, were imitative, deficient, and irrationally selective. In the glorious act of framing a social compact expressive of the supreme law, Americans tended simply to draw up a random catalogue of rights that seemed to satisfy their urge for a statement of first principles—or for some of them. That task was executed in a disordered fashion that verged on ineptness. The inclusion or exclusion of any particular right neither proved nor disproved its existence in a state's colonial history." *Ibid.*

meager debate that attended the insertion of this phrase into Virginia's constitution of 1776 (which was followed by the phrase's appearance in the constitutions of several other States and the federal Northwest Ordinance of 1787), the debates of the various state conventions called to ratify the federal Constitution, and the brief discussion of the proposed Eighth Amendment in the First Congress,[23] concludes that "the cruel and unusual punishments clause was directed at prohibiting certain *methods* of punishment." (Emphasis supplied.) *Id.*, 840-42.

The wording of the clause was a verbatim copy of a prohibition in the English Bill of Rights of 1689. *Id.*, 840. The commentator makes a convincing showing that the English antecedent of the Eighth Amendment was "first, an objection to the imposition of punishments which were unauthorized by statutes and outside the jurisdiction of the sentencing court, and second, a reiteration of the English policy against disproportionate penalties," and that the framers of the state constitutions and the American Bill of Rights inadvertently misinterpreted the language of the English clause as a prohibition against the torturous punishments of seventeenth century England.[24] *Id.*, 860.

Whether those responsible for the enactment of the Eighth Amendment were directing their concern against

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[23]This discussion, and portions of the debates of the state conventions, are set forth in *Weems v. United States*, 217 U.S. 349, 368-69, 372.

[24]At that time the traditional English penalty for women felons was to be burned alive, which penalty might be commuted to beheading. *Id.*, 853. The penalty for treason "consisted of drawing the condemned man on a cart to the gallows, where he was hanged by the neck, cut down while still alive, disembowelled and his bowels burnt before him, and then beheaded and quartered." *Id.*, 854.

torturous methods of punishment or instead against unauthorized or disproportionate punishment, the penal history of England (illustrated in the preceding footnote) as well as contemporary colonial penal experience indicate that the Eighth Amendment was not intended to prohibit the government at that time or any future time from providing death as a penalty for serious offenses.

As Justice Black noted in his concurring opinion in *McGautha v. California*, 402 U.S. 183, the Eighth Amendment's "words cannot be read to outlaw capital punishment because that penalty was in common use and authorized by law here and in the countries from which our ancestors came at the time the Amendment was adopted. It is inconceivable . . . that the framers intended to end capital punishment by the Amendment." *Id.*, 226.

The experience of Massachusetts is a graphic illustration of the fact that those who adopted the constitutional prohibition against cruel and unusual punishment had absolutely no intent thereby to abolish the death penalty for all offenses. The Constitution of the Commonwealth of Massachusetts, approved by the people in 1780, declared that "no magistrate or court of law, shall . . . inflict cruel or unusual punishments." Within four years the Commonwealth saw fit "to place upon the statute books of the new government seven laws that called for the penalty of death that seemed to the General Court, at the end of the eighteenth century and at the beginning of the nineteenth century, to constitute the most serious threats to the peace and welfare of the state." Powers, Crime and Punishment in Early Massachusetts 308-09, 608-09 (1966). These seven capital offenses, which represented a reduction

from fourteen capital offenses in effect in the immediately preceding period,[25] comprised wilful murder, treason, sodomy, rape, arson, robbery, and burglary. *Id.*, 309.

The following chronology as well clearly refutes the theory that those who enacted the Eighth Amendment intended thereby to abolish capital punishment. The Amendment passed the First Congress on September 25, 1789. That same Congress, a mere seven months later, enacted *An Act for the Punishment of Certain Crimes Against the United States*, which statute made the following offenses punishable by death by hanging: treason, murder within federal territory, piracy, and counterfeiting of public securities. Act of April 30, 1790, ch. 9, §§ 1, 3, 8, 14, 33, 1 Stat. 112. The Eighth Amendment was ratified by the States on December 15, 1791, and less than four months later, on April 2, 1792, the Second Congress made it a capital offense to debase coins of the United States Mint. Act of April 2, 1792, ch. 16, § 19, 1 Stat. 246.[26]

The subsequent history of the Eighth Amendment, as it has been interpreted by this Court in the 180 years of the provision's existence, likewise lends no support

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[25]During the period 1630 to 1692 the Bay Colony had twenty-five capital laws, although persons were executed only for violation of nine of them: murder, treason, beastiality, adultery, rape, arson, witchcraft, defiance by Quakers, and piracy. *Id.*, 287.

[26]The constitutions of 48 states contain some provision against excessive punishment; wording of the prohibitions varies from 'cruel and unusual' to 'cruel or unusual' or simply 'cruel,' while a few state constitutions provide that penalties shall be proportioned to the nature or character of the offense. Connecticut and Vermont have no constitutional prohibition, but Conn. Gen. Stat. Ann. § 53-20 (1960) makes cruel or unlawful punishment a crime. With respect to the law of Vermont, see Vt. Stat. Ann. tit. 1, § 271 (1959), incorporating into local law the com-

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for petitioner's claim that the death penalty is uncon tutional when carried out without unnecessary cru as punishment for a serious offense such as murd

Former Justice Goldberg of this Court has no with reference to this Court's treatment of the Eigh Amendment's prohibition against cruel and unus punishment:

> "Indeed, the clause has been substantially d cussed—either by members of the majority or dissent on the Court—on only ten occasions. O three decisions since the adoption of the Bill Rights have interfered with a government's cho of punishments, and in only one of those we five Justices willing to invoke the clause. . . (Footnotes omitted.) Goldberg & Dershowit *Declaring the Death Penalty Unconstitutional,* Harv. L. Rev. 1773, 1777-78 (1970).

It was not until 1878 that this Court, in *Wilkerso v. Utah,* 99 U.S. 130, had occasion to discuss at an length the meaning of the constitutional prohibitio against cruel and unusual punishment. In that case th Court upheld the mode of execution (shooting) as no forbidden by the Constitution's prohibition agains cruel and unusual punishment, *id.,* 134-35, noting th

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mon law of England, which in turn prohibits cruel and unus punishment. . . . See also Vt. Const. ch. 1, art. 18, which i pliedly restrains the legislature and courts in this regard." Not *The Effectiveness of the Eighth Amendment: An Appraisal o Cruel and Unusual Punishment,* 36 N.Y.U. L. Rev. 846, 84 (n.7) (1961). *See also* Legislative Drafting Research Fun Columbia University, Index Digest of State Constitutions 34 (2d ed. 1959) and 1958-1964 Supp. at 71. California's provi sion states, "nor shall cruel or unusual punishments be inflicted." Cal. Const. art. I, § 6. Concurrently 41 States today retain th death penalty. U.S. Bureau of Prisons, National Prisoner Stati tics Bulletin: Capital Punishment 1930-1968 (August, 1969) at 30 (table 15).

"difficulty" in defining "the extent of the constitutional provision" but the applicability of the provision to "punishments of torture . . . and all others [involving] unnecessary cruelty." *Id.*, 136.

In 1890, the Court denied an application for writ of habeas corpus sought on an allegation that death by electrocution constituted a cruel and unusual punishment. *In re Kemmler*, 136 U.S. 436. The Court denied the application on the ground that the Eighth Amendment did not apply to state legislation, but added the comment:

> "Punishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel, within the meaning of that word as used in the Constitution. It implies there something inhuman and barbarous, *something more than the mere extinguishment of life.*" (Emphasis supplied.) *Id.*, 447.

In *Weems v. United States*, 217 U.S. 349, the Court, in 1910, for the first time overturned a punishment as cruel and unusual. In that case the defendant, upon conviction of falsifying an official document, had been sentenced to fifteen years of hard and painful labor to be served in wrist and ankle chains, with attendant life-long disabilities and a severe fine. *Id.*, 358, 364-65. The case arose under the Philippine Bill of Rights, whose prohibition against the "infliction of cruel and unusual punishment, was taken from the Constitution of the United States and must have the same meaning." *Id.*, 367.

The Court was not troubled by the circumstance that the punishment was somewhat novel in the context of the type of punishment to which the cruel and unusual

punishment clause was thought to apply, noting th the clause, like all principles, "to be vital must capable of wider application than the mischief whi gave it birth." *Id.*, 373.

Quoting Cooley's Constitutional Limitations, t Court stated that it was probable that " 'any punis ment declared by statute for an offense which w punishable the same way at common law could not regarded as cruel or unusual, in a constitutional sense.' *Id.*, 375.

In setting aside the punishment, the Court *Weems* noted that "[t]here are degrees of homicid that are not punished so severely," *id.*, 380, and tha the statute in question had no parallel in America legislation and came from a government of differen origins. *Id.*, 377. The Court found the statute "cruel i its excess of imprisonment and that which accompanie and follows imprisonment. It is unusual in its char acter. Its punishments come under the condemnatio of the bill of rights, both on account of their degre and kind." *Ibid.*

The 1947 case of *Francis v. Resweber*, 329 U.S. 459, presented the issue whether a pending second elec trocution of a condemned murderer, following an un successful first attempt at execution, constituted cruel and unusual punishment. The Court rejected the claim of unconstitutional punishment. In an opinion joined by three other members of the Court, Justice Reed in announcing the judgment of the Court discussed the issue "under the assumption, but without so deciding," that a violation of the Eighth Amendment would be violative of the Fourteenth Amendment's due process clause. *Id.*, 462. The opinion concluded:

"We find nothing in what took place here which amounts to cruel and unusual punishment in the constitutional sense. . . . The traditional humanity of modern Anglo-American law forbids the infliction of unnecessary pain in the execution of the death sentence. Prohibition against the wanton infliction of pain has come into our law from the Bill of Rights of 1688. The identical words appear in our Eighth Amendment. The Fourteenth would prohibit by its due process clause execution by a state in a cruel manner. . . .

". . . The cruelty against which the Constitution protects a convicted man is cruelty inherent in the method of punishment, *not the necessary suffering involved in any method employed to extinguish life humanely. . . .*" (Emphasis supplied.) *Id.*, 463-64.

The next occasion on which this Court examined the scope of the Eighth Amendment's prohibition against cruel and unusual punishment was in 1958, in the case of *Trop v. Dulles*, 356 U.S. 86, where Chief Justice Warren, joined by three other members of the Court, concluded that denationalization of a native-born citizen for less than one day's desertion from military duty constituted unconstitutional punishment. Justice Brennan found the enactment of such punishment beyond the power of Congress to legislate, and four justices rejected both of these theories and would have upheld the statute upon which denationalization was premised.

Chief Justice Warren's opinion noted initially, "Since wartime desertion is punishable by death, there can be no argument that the penalty of denationalization is excessive in relation to the gravity of the crime."

Id., 99. *Cf. Williams v. Oklahoma*, 358 U.S. 576, 586-87.

While recognizing that the phrase cruel and unusual punishment was not precise, the opinion clarified the scope of the constitutional prohibition against such punishment by stating, "Fines, imprisonment and even execution may be imposed *depending upon the enormity of the crime*, but any technique outside the bounds of these *traditional penalties* is constitutionally suspect." (Emphasis supplied.) *Trop v. Dulles*, *supra* at 100. Thus the penalty in *Weems* was characterized as meeting the two-prong test of being "cruel in its excessiveness and unusual in its character," *id.*, as was the penalty in the case then before the Court. Stating that the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society," Chief Justice Warren concluded that denationalization, under the circumstances before the Court, constituted "a form of punishment more primitive than torture." *Id.*, 101.

Significantly, Chief Justice Warren's opinion stated:

> "At the outset, let us put to one side the death penalty as an index of the constitutional limit on punishment. Whatever the arguments may be against capital punishment, both on moral grounds and in terms of accomplishing the purposes of punishment—and they are forceful—the death penalty has been employed throughout our history, and, in a day when it is still widely accepted, it cannot be said to violate the constitutional concept of cruelty. . . ." *Id.*, 99.

Thus the opinion, while recognizing "forceful" *legislative* arguments against the death penalty, rejected the

constitutional argument against that form of punishment.

Any doubt whether the Eighth Amendment's ban on cruel and unusual punishment applies to the States, through the operation of the Fourteenth Amendment, was dispelled in 1962 by the decision in *Robinson v. California,* 370 U.S. 660, invalidating punishment of imprisonment imposed on the defendant by reason of his being found to be addicted to narcotics.

The Court's opinion focused not on the nature of the punishment (ninety days in county jail), but on its inappropriateness as applied to a status, that of being a narcotic addict. *Id.,* 667.[27]

In 1968 this Court refused to extend its ruling in *Robinson* to the punishment (by fine of $50) of a defendant convicted of the crime of being intoxicated in a public place, *Powell v. Texas,* 392 U.S. 514, the plurality opinion of the Court distinguishing the punishing of *status,* involved in *Robinson,* from the punishing of the uncompelled *act* before the Court in *Powell. Id.,* 532-33.

If the decisions of this Court applying the cruel and unusual punishment clause are susceptible of synthesization into a consistent body of principles, the cases ap-

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[27]"To be sure, imprisonment for ninety days is not, in the abstract, a punishment which is either cruel or unusual. But *the question cannot be answered in the abstract.* Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold." (Emphasis supplied.) *Id.* "A punishment out of all proportion to the offense may bring it within the ban against 'cruel and unusual punishments.' . . . [T]he principle that would deny power to exact *capital* punishment for a *petty* crime would also deny power to punish a person by fine or imprisonment for being sick." (Emphasis supplied.) *Id.,* 676 (Douglas, J., concurring). "Cruel and unusual punishment results not from confinement, but from convicting the addict of a crime." *Ibid.*

pear to stand for the following propositions. Punishment will be held unconstitutional if it is *both* cruel *and* unusual either as (1) a punishment inherently cruel and inherently unusual in its *form*, or (2) a punishment not inherently cruel and unusual but *grossly excessive as applied* (a) in relation to the seriousness of a particular criminal act or (b) to any status which does not involve an uncompelled act.

Imposition of the death penalty for wilful homicide, in the present case first degree murder, clearly passes muster under the foregoing principles. Execution by means (such as the administration of lethal gas, here involved) which do not cause unnecessary pain or suffering is not an inherently cruel and unusual form of punishment.[28]

The method by which the punishment of death is effected in California is commonly recognized as more humane than the methods in use at the time the Eighth Amendment was adopted and appears to be frequently less cruel and painful than the death by natural causes that comes eventually to us all.[29] And the common use of the death penalty in this country, from the seventeenth century to the present, as indicated previously herein and at greater length in the pages that follow, renders the supreme penalty anything but "unusual."

Assuming then the validity of the death penalty as a form of punishment not intrinsically cruel and unusual

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[28]*Francis v. Resweber*, 329 U.S. 459, 463-64 (second attempt at electrocution); *In re Kemmler*, 136 U.S. 436, 447-49 (electrocution); *Wilkerson v. Utah*, 99 U.S. 130, 134-35 (shooting); *In re Anderson*, 69 Cal. 2d 613, 629-32 [447 P.2d 117, 128-30] (1968) (lethal gas).

[29]*See People v. Daugherty*, 40 Cal. 2d 876, 894-96 [256 P.2d 911, 922-23] (1953), *cert. denied*, 346 U.S. 827.

in its form, a remaining question is whether the penalty is unconstitutional under the foregoing principles as excessive in its application to first degree murderers, such as petitioner. The negative answer to this question need not be belabored since petitioner's offenses indisputably involved overt criminal conduct rather than status, and since, as petitioner concedes, if the death penalty may constitutionally be imposed for any civilian, peacetime crime, it can properly be imposed upon petitioner for first degree murder. (Pet. Br. p. 5.)

B. Capital Punishment Is Widely Accepted and Used in American Society and Comports With Contemporary "Standards of Decency"

Despite the relatively precise showing required by this Court, under the principles previously discussed, as justification for overturning an imposed punishment as cruel and unusual, something this Court has done in only three extreme situations in its history,[30] petitioner and amici have seized upon some of the language of the plurality opinion in *Trop v. Dulles,* 356 U.S. 86, as proof that that decision signaled the end of the right of the people of the various States to prescribe death as the punishment for first degree murder.

Almost ignoring the fact that the opinion in question went out of its way to recognize the continued constitutional validity of the death penalty, *id.,* 99, petitioner prophesizes that the use of the words "evolving standards of decency that mark the progress of a

[30]*Robinson v. California,* 370 U.S. 660 (punishing of status as narcotic addict); *Trop v. Dulles,* 356 U.S. 86 (punishment of denationalization, opinion of four members of the Court); and *Weems v. United States,* 217 U.S. 349 (punishment blatantly cruel and unusual both in the severity of its form and in its excessiveness in relation to the particular offense).

maturing society," *id.*, 101, sounded a talismanic death knell of three hundred years of capital punishment in this country. However, in all fairness to petitioner, his fixation with this phrase is understandable in view of its providing the only arguable escape from the historical reality of capital punishment's recognition as a legitimate penalty, outside the scope of cruel and unusual punishment, in the wording of the Constitution and in the law that preceded and followed adoption of that document and the Bill of Rights.

In his attempt "to avoid the impact of this history,"[31] petitioner has failed to demonstrate that anything that has transpired in the last thirteen years has impugned the validity of the observation, in 1958, that the death penalty "in a day when it is still widely accepted . . . cannot be said to violate the constitutional concept of cruelty." *Trop v. Dulles,* 356 U.S. 86, 99 (plurality opinion of Warren, C.J.).

The history of capital punishment in this country, and the deep-rooted origins of that form of punishment in the religious and moral heritage of contemporary Americans, provide clear indications that the death penalty is no barbaric relic of the past.

The history of the death penalty is as old as the history of man himself. Records of death as a punishment ordered by the state go back to ancient China, Assyria and early Egypt (as far back as 1500 B.C.), and the Greeks. The first record of capital punishment in England is from 450 B.C. Laurence, A History of Capital Punishment 1-2 (1932).

The reliance of some of *amici* on biblical references and religious principles, in support of their assertion

[31] *McGautha v. California,* 402 U.S. 183, 203.

that the death penalty is immoral and unjustified, is particularly inappropriate in light of the Old Testament's repeated recognition of the death penalty as a proper form of punishment. These references indicate a clear distinction between the sin of an individual's taking life and the right of the State to take the life of a murderer for the protection of society. Thus the Sixth Commandment, "Thou shalt not kill" (Holy Bible, Authorized King James Version, *Exodus* 20:13), is preceded by the admonition, "Whoso sheddeth man's blood, by man shall his blood be shed" (*id., Genesis* 9:6), and followed by numerous other references justifying the death penalty for murder,[32] including the decree, "He that smiteth a man, so that he die, shall be surely put to death." (*Id., Exodus* 21:12.) The New Testament as well contains references to the death penalty for murder.[33]

With reference to the Church's attitude toward the death penalty during the Middle Ages, a religious scholar has written in a Catholic periodical published in Los Angeles:

> "[I]ndividual Popes, theologians and councils of the Church have explicitly approved of it at different periods of history.
>
> ". . .
>
> "Pope Innocent the Third (1198-1216 A.D.) . . . reiterated this right. 'The secular power can inflict the death penalty,' the Pope remarked, 'without grievous sin.' (Denzinger, Enchridion No. 425).

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[32]*Id., Leviticus* 24:17, 21; *Numbers* 35:16-18, 30-31; *Deuteronomy* 19:11-12.

[33]*Id., St. Matthew* 5:21-22, 26:52; *St. John* 19:10-11; *Acts* 25:11; *Romans* 13:1-4; *Revelation* 13:10.

"And the Catechism of the Council of Trent observes that the state in executing this right is 'not only not guilty of murder, but eminently follows the law (the Fifth Commandment) which prohibits murder.' (Catechism of the Council of Trent, Part 3, Chap. 6, Q. 4)." The Tidings (February 13, 1959), p. 9.

The writings of other religious authorities confirm the fact that capital punishment is consistent with our Christian heritage. In the fifth century St. Augustine wrote "of the cases in which we may put men to death without incurring the guilt of murder." St. Augustine, City of God 27 [Book I, ch. 21] (Mod. Library ed. 1950). In the thirteenth century St. Thomas Aquinas wrote of the justification for the death penalty as a form of punishment. 2 Basic Writings of St. Thomas Aquinas 712 [Q. 87, Art. 3], 843-44 [Q. 100, Art. 8] (Pegis ed. 1945). Reference to philosophers (Plato, Pascal, Locke, Kant, Montesquieu, Rousseau), who over the centuries have written in support of the death penalty, are quoted in Allen, *Capital Punishment: A Matter of Human and Divine Justice*, The Police Chief, vol. 27 (March, 1960) at 1.

Despite the position that the foregoing religious and philosophical authorities occupied in the heritage of the Framers of the Constitution, and the bearing that they continue to have on our present-day beliefs and practices, petitioner implies that it is only police officers and prosecutors, presumably vengeful and out of step with "the evolving standards of decency that mark the progress of a maturing society,"[24] who are in favor of the death penalty today. (Pet. Br. 43.)

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[24] *Trop v. Dulles*, 356 U.S. 86, 101.

There are innumerable indicia of the general public's continued acceptance of the death penalty as a necessary form of punishment consistent with contemporary religious and moral standards of decency and the dignity of man.

Respondent wishes to emphasize its position that the meaning of the cruel and unusual punishment clause cannot expand and contract with the ebb and flow of something as fickle as public opinion as reflected in polls and surveys. Nevertheless since opponents of the death penalty have relied on such indicators in support of their contention that the death penalty is out of favor with all but the police, prosecutors, and a few misguided others, respondent feels compelled to put the lie to this contention. Public sentiment has swung strongly in favor of the death penalty since this Court, citing a 1966 Gallup Poll, characterized the United States as a "nation less than half of whose people believe in the death penalty." *Witherspoon v. Illinois*, 391 U.S. 510, 520. The most recent Gallup Poll and California Poll indicate the following attitudes of the public.

TABLE A

Public Opinion Polls on the Death Penalty

	Retain Captital Punishment	Abolish Captital Punishment	Qualified or No Opinion
California[55]			
1971 (August)	58%	34%	8%
1969	65%	26%	9%
1966	54%	30%	16%
1965	51%	39%	10%
1960	55%	35%	10%
United States[56]			
1969	51%	40%	9%
1966	42%	47%	11%
1965	45%	43%	12%
1960	51%	36%	13%

The most recent large-scale expression of public opinion, of which respondent is aware, occurred on Decem-

[55]The 1960-1969 figures are taken from Field Research Corporation, The California Poll (Release No. 635, May 22, 1969). The question posed to a "representative sample of Californians, numbering 1,011, in a survey taken early this month was the same one which has been asked of other representative samples over the years: 'As you know, this state has capital punishment—that is, execution—as a form of punishment for criminals. How do you personally feel about capital punishment—would you be in favor of doing away with the death sentence, or do you feel that the death sentence should be kept as a punishment for serious crimes, as it is now?'" *Ibid.* These figures are also reproduced in Erskine, *The Polls: Capital Punishment*, 34 Pub. Op. Q. 290, 295 (1970). The 1971 results, based on a sampling of the opinion of 508 persons, are taken from Field Research Corporation, The California Poll (Release No. 726, September 14, 1971).

[56]Gallup International Inc., Gallup Opinion Index 15-16 (Report No. 45, March, 1969). The question posed to "a minimum of 1,500 adults" approximately "2 or 3 weeks prior to publication," was "are you in favor of the death penalty for persons convicted of murder?" *Ibid.* The results of this poll are reproduced in Erskine, *The Polls: Capital Punishment*, 34 Pub. Op. Q. 290, 291-94 (1970).

ber 15, 1970, when the voters of the State of Illinois, in conjunction with a vote on whether to ratify the new constitution adopted by their constitutional convention, were asked to ballot as to whether the death penalty should be abolished in that jurisdiction. The following referendum results with respect to the latter question are probably a good indication of national sentiment in view of Illinois' position as a large State having substantial metropolitan and rural populations.

TABLE B

December 1970 Illinois Referendum on Whether to Abolish the Death Penalty[87]

	Votes	Percentages
Yes	676,302	35.7%
No	1,218,791	64.3%
Total	1,895,093	100%

The large majority of persons convinced of the need for capital punishment in America in recent years reflects a cross-section of the nation's population.[88] At the height of the unsuccessful campaign to abolish the death penalty in California, in the late 1950's and early 1960's, a Committee to Oppose Abolition of Capital Punishment was formed "to include in our numbers the vast majority of citizens who feel the abolition of the death penalty cannot serve the better interests of the California community."[89] Undoubtedly retail clerks, grocery and liquor store operators, pharmacists, bank tellers, gas station attendants, and others who like

[87]Illinois Secretary of State, Constitution of the State of Illinois and United States 13, 15 (1971).

[88]This proposition is supported by the reported breakdown of the figures produced in the national poll cited in n. 36, *infra*.

[89]Los Angeles Times, Part I, p. 8 (Feb. 14, 1959).

police officers have frequent occasion to look dow the "business end" of a robber's pistol or shotgu do not share petitioner's sentiment that the death pe alty is a barbaric relic of the past. And a recent meetin of the International Federation of Airline Pilots' Asso ciations in London demanded the death penalty fo airplane hijackers.[40]

Even the religious community is divided on the issue of capital punishment. At least two ministers have gone before California legislative committees to testify in favor of the death penalty, one of them a former chaplain at California's Folsom Prison,[41] and the 1967 biennial governing convention of the 2.8-million-member Lutheran Church Missouri Synod adopted a resolution stating, " 'Capital punishment is in accord with the Holy Scriptures and the Lutheran confessions.' "[42] The Associate Executive of the United Presbyterian Church in the United States has written in favor of capital punishment,[43] as have representatives of the Catholic

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[40]*Id.*, Part I, p. 20 (Dec. 18, 1969).

[41]*Id.*, Part I, p. 1 (Aug. 10, 1963); *Id.*, Part I, p. 5 (June 3, 1963). Representatives of the Protestant, Catholic, and Jewish faiths testified in favor of the death penalty in Florida. Florida Special Comm'n for the Study of Abolition of Death Penalty in Capital Cases, Report 31 (1965).

[42]Los Angeles Times, Part III, p. 8 (July 15, 1967).

[43]Vellenga, *Christianity and the Death Penalty*, in Bedau, The Death Penalty in America (rev. ed. 1967) 123, 129, reprinted from *Is Capital Punishment Wrong?*, Christianity Today, vol. IV, no. 1 (October 12, 1959), at 7-9: "No one can deny that the execution of a murder is a horrible spectacle. But we must not forget that murder is more horrible. . . . The law of capital punishment must stand as a silent but powerful witness to the sacredness of God-given life. Words are not enough to show that life is sacred. Active justice must be administered when the sacredness of life is violated."

Church[44] and noted contemporary scholars and philosophers.[45]

The death penalty is also favored by those who have the most extensive contact with the criminal element, law enforcement[46] and correctional officers.[47] Significantly, on September 14, 1971, the Conference of Delegates of the State Bar of California voted to support the retention of capital punishment, reversing its stand of two years earlier.[48]

In short, contrary to the impression that petitioner seeks to convey, there appears to be substantial support for the death penalty in almost all social, eco-

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[44]*E.g.*, Father John V. Sheridan in The Tidings, *supra* at 9 (February 13, 1959).

[45]*E.g.*, Jacques Barzun, Dean of Faculties and Provost of Columbia University, in Barzun, *In Favor of Capital Punishment*, in Bedau, The Death Penalty in America (rev. ed. 1967) 154, reprinted from The American Scholar, vol. 31, no. 2 (Spring 1962), at 181-91; and Sidney Hook, Professor of Philosophy and Chairman of the Graduate Philosophy Department at New York University, in Hook, *The Death Sentence*, *id.*, at 146, reprinted from The New Leader, vol. 44 (April 3, 1961), at 18-20.

[46]*E.g.*, J. Edgar Hoover, *Statements in Favor of the Death Penalty*, *id.*, 130, reprinted from law enforcement publications; and the Chief of Police of Santa Ana, California, writing in Allen, *Capital Punishment: Your Protection and Mine*, *id.*, at 135, reprinted from The Police Chief, vol. 27 (June, 1960) at 22, the official publication of the International Association of Chiefs of Police; Allen, *Capital Punishment: A Matter of Human and Divine Justice*, The Police Chief, vol. 27 (March, 1960) at 1. Associations of peace officers and district attorneys again opposed abolition of the death penalty before the California Legislature this year. Los Angeles Times, Part I, pp. 3, 24 (June 23, 1971).

[47]*E.g.*, The Prison Officers Assn. of Great Britain has demanded the return of the death penalty, stating that "since abolition of capital punishment . . ., 'There is nothing to deter the growing number of long-term criminals from killing prison officers in an attempt to escape.'" Los Angeles Times, Part I, p. 21 (Nov. 16, 1966).

[48]Los Angeles Times, Part I, p. 1 (September 15, 1971).

nomic, and occupational groups, and indeed the preponderance of public opinion is in favor of retaining the death penalty as one of the alternative forms of punishment available for serious offenses.

Thus it is highly misleading for *amicus curiae* the American Civil Liberties Union to quote from only selected portions of the transcript of a trial (in which one of counsel for such amicus appeared as counsel of record), without reference to any of the *contrary* testimony, in an effort to convey the impression that the evidence at such proceedings establishes the unconstitutionality of the death penalty. That evidence, which was never before the state courts at trial or on appeal in the present case, is extensively referred to throughout the brief of amicus.[49]

Thus while respondent deems it inappropriate to argue the evidence presented in that collateral proceeding,[50] the following information is conveyed in order to correct the misimpression created by amicus. In addition to the ten defense witnesses who appeared before the trial court at the hearing to determine the constitutionality of the death penalty, fifteen prosecution witnesses appeared and testified in support of capital punishment. These supporters of capital punishment included a Presbyterian minister (who as a former correctional officer at San Quentin had witnessed executions and been on duty on Death Row), a

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[49]At pp. 8-9, 14, 15(n.10), 17-18(n.27), 19(n.28), 20 (n.34), 21-22(nn.35, 36), 24-28, 29(n.46), 31, 35-37, 44(n. 61) and the entire Appendix A to said brief (pp. 1a through 58a).

[50]*People v. Thornton*, Los Angeles Superior Court No. 323-445, presently pending before the California Supreme Court.

Catholic priest, a psychiatrist, an eminent professor of law, a defense attorney formerly against the death penalty who previously as a deputy district attorney had prosecuted a robber who had moved his operations to a non-death-penalty State because of fear of that punishment, a state senator, a state assemblyman, two chiefs of police, a chief of detectives, a former deputy sheriff who heard two criminal suspects tell a news reporter that fear of the death penalty had kept them from killing the arresting officers, an undercover officer who overheard a criminal (unaware of the officer's identity) advise a cohort not to murder because there was the risk of the death penalty, the wife of a grocery store owner who heard a robber make a similar statement to a cohort during the course of a holdup, a former president of the county medical association whose colleague had a similar experience, and the present warden of San Quentin Prison who testified as to death row inmates receiving meals superior to those given the general prison population, and regarding other favorable aspects of the living arrangements on death row, the general opinion of prison personnel that their work would be almost impossible without the death penalty, and the request (granted) of a non-capital inmate upon his release to be shown the gas chamber as a reminder never to commit murder. Upon the conclusion of the foregoing proceedings the trial court made findings of fact and stated conclusions of law rejecting the position of amicus.

The popular sentiment in favor of the death penalty as a necessary form of punishment is reflected in the number of American jurisdictions retaining the supreme penalty: the federal government, the District of Columbia and forty-one of the fifty States (eight of which

experimented for varying periods with abolition of the death penalty, only to restore it, Delaware as recently as 1961).[51]

In California, at least, the introduction and defeat of a bill to abolish the death penalty has become an almost annual ritual. Such a bill was again defeated by the Legislature in 1970.[52] In contrast a new capital offense was added to the California Penal Code in 1970,[53] and bills are before the 1971 California Legislature which would add additional capital offenses.[54] After extensive study, the staff of a California legislative committee has recommended that a revised penal code retain capital punishment.[55] And two additional federal capital offenses were enacted as recently as 1965 and 1961.[56]

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[51]U.S. Bureau of Prisons, National Prisoner Statistics Bulletin: Capital Punishment 1930-1968 (August, 1969) at 30 (Table 15).

[52]California Legislature, Final Calendar of Legislative Business: Regular Session 1970, Assembly Final History 52 (Bill 20). *See also People v. Love*, 56 Cal.2d 720, 737-38 [366 P. 2d 33, 42] (1961) (McComb, J., dissenting).

[53]Section 12310, explosion or ignition of a destructive device or explosive causing mayhem or great bodily injury.

[54]Assembly Bill 619 would make it a capital offense to assault a peace officer or fireman and thereby proximately cause his death. Assembly Bill 1525 would make it a capital offense to kidnap any elected public officer. Senate Bill 112, passed by the Senate and sent to the Assembly, would provide for an automatic finding of first degree murder for any person convicted of committing murder of a peace officer. California Legislature, Legislative Index (August 17, 1971); California Legislature, Senate Weekly History (September 17, 1971).

[55]State of California, Joint Legislative Committee for Revision of the Penal Code, The Criminal Code §315(a)(1) (Staff Draft) 18-19 (1971).

[56]18 U.S.C. § 1751 (assassination of the President, Vice President or other officer in the line of succession); 49 U.S.C. § 1472(i) (aircraft piracy).

It is ridiculous for petitioner and amici to focus upon the small number of executions in recent years as an indicator of declining popular acceptance of the death penalty, when it is common knowledge that these figures are the result of reversals and stays of execution granted by state[57] and federal courts, including this Court, during the pendency of various legal challenges to the death penalty made in cases such as *Maxwell v. Bishop*, 398 U.S. 262; *McGautha v. California*, 402 U.S. 183, and the case at bar.

A much more accurate barometer of the "evolving standards of decency that mark the progress of a maturing society"[58] is the constant number of defendants whom juries annually send to the nation's prison systems under sentence of death, as indicated in the following figures.

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[57]*See, e.g., People v. Goodridge*, 70 Cal. 2d 824, 839 [452 P. 2d 637, 646] (1969): "Although defendant had not challenged the constitutionality of the death penalty, this court delayed filing its opinion in this case until that question was resolved in In re Anderson, 69 Cal.2d 613 [. . . 447 P.2d 117]. This court further delayed action in all pending automatic appeals to permit defendants to challenge the composition of the jury following Witherspoon v. Illinois, 391 U.S. 510. . . ."

[58]*Trop v. Dulles*, 356 U.S. 86, 101 (plurality opinion of Warren, C.J.).

TABLE C

Number of Prisoners Received in Prison Under Death Sentence

	California[59]	United States[60]
1970	36	—
1969	14	—
1968	27	102
1967	20	85
1966	27	118
1965	22	86
1964	19	106
1963	24	93
1962	21	103
1961	20	140

The foregoing figures with respect to the imposition of capital punishment are hardly indicative of "extreme contemporary rarity resulting from a demonstratable historical movement which can only be interpreted fairly as a mounting and today virtually universal repudiation." (Pet. Br. p. 12.)

Respondent questions, and fails to perceive the relevancy of, petitioner's assertion that "there is evident a definite, continuing, long-term, accelerating, worldwide

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[59]California Department of Corrections, California Prisoners 1968 (June, 1969), at 92 (Table 35) (the latest edition of this publication available at the present time). The 1969 and 1970 figures are statistics from the files of the Department destined for publication in the next two editions.

[60]U.S. Bureau of Prisons, National Prisoner Statistics Bulletin: Capital Punishment 1930-1968 (August, 1969) at 12 (Table 4) (the latest edition of this publication available at the present time).

trend toward ending the use of the penalty of death."[61] (Pet. Br. 4e.) That is a frail foundation upon which to postulate the unconstitutionality of the death penalty. This Court's interpretation in 1971 of what the Framers of the Eighth Amendment had in mind in 1789 can hardly be affected by petitioner's characterization of Liechtenstein, Luxembourg, Nicaragua, and Surinam as having *de facto* abolished the death penalty. (Pet. Br. 2e.) Suffice it to say that (1) the total number of nations which are abolitionist *de jure* or *de facto* represents a distinct minority in the world community,[62] (2) the conditions that lead a jurisdiction to conclude that a particular punishment is or is not required for the protection of its populace vary from nation to nation,[63] as they vary from State to State within our own federal republic, and (3) petitioner has not pointed to any abolitionist nation which has rejected the death penalty by judicial declaration of unconstitutionality. In any event, "[o]n the evidence

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[61]"A trend requires a base, and movement from it. . . . Inspection of the cited data reveals, however, no base and no movement, only a description of the present legislative situation. . . . [I]f, as appears to be true, for a number of years the situation has been relatively stable, . . . then it is hard to see how 'evolving standards of decency' . . . can be said to be violated." Packer, Comment, *Making the Punishment Fit the Crime*, 77 Harv. L. Rev. 1071, 1073-74 (1964).

[62]United Nations, Department of Economic and Social Affairs, Capital Punishment 9-11, 83-85 (1968). Included among the nations retaining the death penalty are countries as civilized as ours (*e.g.*, France, Spain, Australia, and Japan). *Id.*, 9, 83.

[63]Compare the following remarks of one of the justices who acquitted seven persons in Papua-New Guinea this year of a charge of cannibalism: "[C]annibalism was not improper or indecent in the men's community. One cannot conceive that the legislature would have intended to impose uniform standards of decency and propriety on all the peoples of this country." Los Angeles Times, Part I, p. 15 (Aug. 12, 1971).

available it does not appear that this is a case for due process by head count."[64]

If indeed the "relevant Eighth Amendment touchstone is the judgment of enlightened public opinion" (Pet. Br. 24(n.40)), then what more enlightened assemblage could there be than the twelve jurors in the hundreds of pending capital cases who on the basis of the evidence presented to them in court solemnly exercised their judgment on the ultimate question whether the defendant was "fit to live."[65] As this Court has recognized, "one of the most important functions any jury can perform in making such a selection is to maintain a link between contemporary community values and the penal system." *Witherspoon v. Illinois*, 391 U.S. 510, 519(n. 15). "In our criminal courts the jury sits as the representative of the community; its voice is that of the society against which the crime was committed." *Williams v. New York*, 337 U.S. 241, 253 (Murphy, J., dissenting).

The specter often raised of a wholesale bloodbath in the event all of the 600 to 700 prisoners under sentence of death were to be executed in the coming year is first of all irrelevant to a *constitutional* determination of whether the States remain free to decree that alternate punishment for murder. Also irrelevant in the present context is whether it costs more to execute a man than to keep him alive; and whether capital cases have an adverse effect on our court system.

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[64]Packer, *supra*, at 1074. "Of course it is true that by the middle of the nineteenth century the very considerable list of capital offenses in most jurisdictions had been cut down to a much smaller number. (Citation.) But that movement appears to have ended by about 1900." *Id.*, 1073(n. 9.)

[65]*Witherspoon v. Illinois*, 391 U.S. 510, 521(n.20); *People v. Morse*, 60 Cal. 2d 631, 647 [388 P.2d 33, 43] (1964).

Such considerations bear solely on the *legislative* desirability of the death penalty. Secondly the specter of mass execution is an unrealistic parade of horribles. By way of example, only 25 of the 102 prisoners on death row in California have had their judgments of conviction imposing the death penalty affirmed by the California Supreme Court; the remainder have yet to have their cases reviewed on automatic appeal[66] or instead are awaiting new trials on the issue of penalty. California State Prison at San Quentin, Execution Data (September 1, 1971). Of those 25 a great number have petitions for writ of certiorari pending in addition to future clemency hearings[67] and issues available upon which to base collateral proceedings in the state and lower federal courts.

Respondent fails to comprehend how the length of the average inmate's confinement on death row can render his ultimate execution cruel and unusual, particularly since part of the delay in carrying out the judgment is occasioned by the States' desire for a full and adequate appellate review of the proceedings which led

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[66]Cal. Pen. Code §1239 (providing for an automatic appeal since 1935). Under this section review of the case and reversal may occur even contrary to the defendant's wishes. *People v. Stanworth*, 71 Cal. 2d 820, 832-35 [457 P.2d 889, 895-900] (1969). The California Supreme Court considers itself bound to review the record for errors not raised by the defendant when the case is a capital one. *See People v. Goodridge*, 70 Cal. 2d 824, 839 [452 P.2d 637, 646-47] (1969); *People v. Robinson*, 61 Cal. 2d 373, 388(n.14) [392 P.2d 970, 979] (1964). If the California Supreme Court's review of these cases follows the pattern of the past six years, the majority of these individuals will have their judgments imposing the death penalty reversed or modified to impose a life sentence. See *infra*, Appendix p. 1, Table H.

[67]Petitioner recognizes that "governors will almost never give consideration to commutation in a capital case while judicial proceedings are pending. . . ." (Pet. Br. 40 (n.78)).

to the imposition of the death sentence. Innovative decisions by this Court and other federal and state courts have contributed to lengthening the appellate and collateral review of capital cases, and thereby to increasing the median elapsed time of prisoners on death row in the various jurisdictions from 14.4 months at the end of 1961 to 33.3 months at the end of 1968.[49] Some of this delay may be a temporary phenomenon rather than an unavoidable characteristic of our judicial system. But thus a large part of the delay has been for the benefit of the condemned prisoners, who would be the first to complain of undue haste if they were accorded less due process on review of their judgments of death.[50] However, in addition to the foregoing meaningful review, there are countless frivolous actions filed by such inmates which, in conjunction with stay applications filed therewith, result in the

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[49]U.S. Bureau of Prisons, National Prisoner Statistics Bulletin Capital Punishment 1930-1968 (August, 1969) at 12 (Table 4).

[50]The course of two California cases through the official reports is illustrative of why it takes so long for the judgment in a capital case to become final: (1) *People v. Seiterle*, 56 Cal. 2d 320 [363 P.2d 913] (1961); *Seiterle v. Superior Court*, 57 Cal. 2d 397 [369 P.2d 697] (1962); *People v. Seiterle*, 59 Cal. 2d 703 [381 P.2d 947] (1963), *cert. denied*, 375 U.S. 887; *In re Seiterle*, 61 Cal. 2d 651 [394 P.2d 556] (1964), *cert. denied*, 379 U.S. 992; *People v. Seiterle*, 65 Cal. 2d 333 [420 P.2d 217] (1966), *cert. denied*, 387 U.S. 912; *In re Seiterle*, 71 Cal. 2d 698 [456 P.2d 129] (1969); (2) *People v. Terry*, 57 Cal. 2d 538 [370 P.2d 985] (1962), *cert. denied*, 375 U.S. 96[illegible]; *People v. Terry*, 61 Cal. 2d 137 [390 P.2d 381] (1964), *cert. denied*, 379 U.S. 866; *People v. Terry*, 70 Cal. 2d 410 [45[illegible] P.2d 36] (1969), *cert. denied*, 399 U.S. 811; *In re Terry*, 4 Cal. 3d 911 [484 P.2d 1375] (1971); fifth retrial of the issue of penalty is presently pending in Los Angeles Superior Court. *Id.*, 915 [484 P.2d at 1378-79]. *See also* the chronology set forth in *United States ex rel. Townsend v. Twomey*, 322 F. Supp. 158, 160-61 (N.D. Ill. 1971.)

setting aside of execution dates previously fixed."[72] In other words the State does not purposefully, or even negligently, subject the inmate to an unduly long period of pre-execution incarceration on death row; it is often the inmate, unsatisfied with a full and adequate appellate review, who himself prolongs his time on death row to that extreme length which places in disrepute the entire system of administration of justice."

Nor is there anything cruel and unusual in the physical surroundings of the men awaiting execution, as is evident from a recent article in the New York Times authored by one of the inmates on San Quentin's death row.[73] Further detail regarding the routine of these men is provided below.[74]

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[72]In California an execution date is set 60-90 days after the initial appeal is determined and 30-60 days after any subsequent appeal is determined. Cal. Pen. Code §§ 1193, 1227.

[73]One study contains suggestions as to how the "unnecessarily slow process" in capital cases could be expedited. *Post-Conviction Remedies in California Death Penalty Cases*, 11 Stan. L. Rev. 94, 132-35 (1958.)

[74]Welch, *San Quentin's Death House*, New York Times, p. 31 (July 23, 1971): "Disregarding the omnipresent fear of the gas chamber, our living conditions aren't so bad. By prison standards the food is good, although we're only fed two meals a day. [Sandwiches are provided at the second meal for a later snack in the evening.] We have TV's and piped in radio. We can take educational courses and order nearly any type book, magazine or newspaper.

"We're allowed visitors, can write and receive letters from anyone, and can also write for publication. We can buy typewriters, commissary items, and stationery from outside sources. Our exercise period lasts three and half hours each day, and we get to take showers twice a week.

"On the other hand, the only time we get sunshine is walking to and from a visit. [The other two units of death row, where inmates requiring less security are housed, are given their exer-

(Footnotes 72 and 73 continued on following page)

In summary, respondent submits that the death penalty is consistent with "evolving standards of decency that mark the progress of a maturing society,"[74] in that all but nine of the fifty States, plus a majority of persons, representing many segments of our society, have concluded that such punishment is necessary for the protection of society. Capital punishment is neither inherently cruel and unusual *per se*, nor cruel and unusual in the manner by which it is imposed, or in relation to the crime of murder. Nor do the length or nature of pre-execution confinement bring capital punishment within the "[p]rohibition against the wanton infliction of pain" contained in the Fourteenth Amendment insofar as it incorporates the Eighth Amendment. *Francis* v. *Resweber*, 329 U.S. 459, 463; *In re Anderson*, 69 Cal. 2d 613, 632 [447 P.2d 117, 130] (1968); *People v. Chessman*, 52 Cal. 2d 467, 498-99 [341 P.2d 679, 699-700] (1959), *cert. denied*, 361 U.S. 925.

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cise period in an outside yard.] Our safety razors are equipped with locks so the blades can't be removed. Our cells are searched periodically for weapons and contraband, and during exercise we are watched constantly by a guard with a rifle." (Bracketed material supplied by respondent.)

[73]"Between 10:30 A.M. and 2:00 P.M., all men are released from their cells for exercise in the corridor extending the length of the Unit. A punching bag, ping pong, card table and games are provided. . . . Men have TV, radio outlets, and library books and newspapers as cell activities. Many men do extensive legal work and some take academic correspondence courses. They receive visits from attorneys, relatives and friends, of long standing. Due to retrials and court-granted stays of execution, the average length of time on condemned status is increasing with nearly half the men having a tenure of over two years. . . ." California State Prison at San Quentin, Capital Punishment in California 3 (August 1, 1970).

[74]*Trop v. Dulles*, 356 U.S. 86, 101 (plurality opinion of Warren, C.J.).

In view of the common use and acceptance of capital punishment during the entire history of our nation, up to and through the present, it is appropriate to join in the following observation by Justice Holmes for a unanimous Court:

"The 14th Amendment, itself a historical product, did not destroy history for the states, and substitute mechanical compartments of law, all exactly alike. If a thing has been practiced for two hundred years by common consent, it will need a strong case for the 14th Amendment to affect it." *Jackman v. Rosenbaum Co.*, 260 U.S. 22, 31.[15] Respondent submits, on the basis of this argument and those that follow, that petitioner has failed to make his case against the constitutionality of the death penalty.

C. In View of Petitioner's Inability to Make a Clear Showing That the Death Penalty Serves No Legitimate Function, the Federal Constitution Leaves the People of the State of California Free to Determine Through Their Elected Representatives That the Protection of Society Under Present Conditions Requires Death as a Form of Punishment for Certain Serious Offenses

One facet of petitioner's attack on the constitutionality of the death penalty is his assertion that no social interest is served by the state's putting a man to death that could not be served as well by a term of life imprisonment, and that therefore the death penalty constitutes "unnecessary cruelty".[16] (Pet. Br. 56.)

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[15] *See also Coolidge v. New Hampshire*, ... U.S. ...., 91 S. Ct. 2022, 2053 (Black, J., dissenting); *McGautha v. California*, 402 U.S. 183, 203; *Walz v. Tax Commission*, 397 U.S. 664, 678.

[16] *Weems v. United States*, 217 U.S. 349, 370.

Respondent submits that this assertion again st
a matter for the consideration of a legislative body
not for a Court called upon to determine whethe
particular mode of punishment is constitutionally
hibited to the States. Assuming, as demonstrated in
preceding arguments, that petitioner's judgment
sentence of death is neither cruel and unusual *per*
nor cruel and unusual in the mode in which it i
be carried out or in relation to petitioner's crime
murder, respondent is hard pressed to comprehend
a constitutional issue is raised by petitioner's claim
alternative remedies to capital punishment are avail
to the state and federal governments, much less
such an allegation raises an issue of cruel and unu
punishment.

The reliance of petitioner and *amici* on selec
sociological, penological, and psychiatric findings
supposed proof of the social inutility of the de
penalty, evokes the observation that

> ". . . questions for this Court are not settled
> reference to medicine or penology. Our task
> to determine whether the principles embodied
> the Constitution of the United States place
> limitations upon the circumstances under wh
> punishment may be inflicted, and, if so, wheth
> in the case now before us, those principles
> clude the imposition of such punishment."
>
> *Powell v. Texas*, 392 U.S. 514, 565-66 (Fort
> J., dissenting).

Turning to the merits of petitioner's assertion, it
readily apparent that petitioner has grossly overstat
his case in concluding that there is absolutely no s
stantial evidence that the protection of society is furth

ed by the imposition of the death penalty for serious offenses. From his treatment of some of the studies that have been made on this subject, it appears that petitioner views it to be an established fact that the death penalty accomplishes no legitimate social function. (Pet. Br., App. H.)

For reasons which will be set forth at greater length at the conclusion of this argument, respondent does not view its present task as encompassing conclusive proof of the social utility of capital punishment. Aside from the fact that such a showing can be, and has been, more appropriately and effectively attempted in the legislative arena, it is submitted that the burden, if any, which respondent must assume in the judicial setting of an attack on the constitutionality of the death penalty, is only to demonstrate that there is in fact a basis upon which the California Legislature could reasonably conclude that certain serious offenses[77] should be punishable by death.

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[77]There are eight capital offenses in California: (1) first degree murder (Cal. Pen. Code § 190), (2) kidnaping for gain with bodily harm (Cal. Pen. Code § 209), (3) assault with a deadly weapon by a life prisoner (Cal. Pen. Code § 4500), (4) explosion or ignition of a destructive device or explosive causing mayhem or great bodily injury (Cal. Pen. Code § 12310, enacted in 1970), (5) treason (Cal. Pen. Code § 37), (6) sabotage of war or defense effort causing death or great bodily injury (Cal. Mil. & Vet. Code §§ 1670, 1672(a)), (7) train wrecking (Cal. Pen. Code § 219), and (8) procurement of the conviction and execution of any innocent person by perjury or subornation of perjury (Cal. Pen. Code § 128). The death penalty is mandatory for the offenses listed (6) and (7), as well as for the offense listed (3) when the commission thereof results in the death of a non-inmate victim. However, since 1893, when the State assumed the sheriffs' responsibility for conducting executions and complete records became available, executions have been limited to persons convicted of first degree murder, aggravated kidnaping, and assault with a deadly weapon by a life

(This footnote is continued on next page)

The objectives of punishment, whose furtherance t
California Legislature entrusts to the trier of fact
capital cases, were set forth by the California Supre
Court in an opinion defining the awesome and compl
task conferred upon the jury in such a case:

> "[I]n deciding the question whether the accus
> should be put to death or sentenced to imprisc
> ment for life it is within their discretion alone
> determine, each for himself, how far he will a
> cord weight to the considerations of the several o
> jectives of punishment, of the deterrence of crim
> of the protection of society, of the desirability
> stern retribution, or of sympathy or clemency,
> age, sex, human passion, ignorance or weakne
> or (if appropriate under the evidence, of illness
> intoxication or provocation not sufficient to r
> duce the degree or class of the crime), of the pr
> sumptions concerning, or possible uncertainti

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prisoner. Of the 292 executions in California since 1930, 2
were for first degree murder, 6 for aggravated kidnaping, and
for assault with a deadly weapon by a life prisoner. U.S. Bure
of Prisons, National Prisoner Statistics Bulletin: Capital Punis
ment 1930-1968 (August, 1969) at 11 (Table 3); *Hearin*
Before the Subcommittee on Criminal Laws and Procedures
the Senate Committee on the Judiciary on S. 1760, to Aboli
the Death Penalty, 90th Cong., 2d Sess. 212-18 (1970). T
records of the California State Prison at San Quentin indica
that as of September 1, 1971, there were 91 men and 4 wom
under death sentence for murder, 4 men under death senten
for assault with a deadly weapon by a life prisoner, havi
no other death sentence, and 3 men under death senten
for aggravated kidnaping having no other death sentenc
Much of the force of the capital offense listed as (2) w
sapped by the decision in *People v. Daniels*, 71 Cal. 2d 111
1139 [459 P.2d 225, 238] (1969), excluding from the oper
tion of California Penal Code section 209 those kidnapin
which are solely to facilitate, and are merely incidental to, t
crime of robbery, where the movement of the victim does n
substantially increase the risk of harm. The *Daniels* decision h
been applied fully retroactively. *People v. Mutch*, 4 Cal. 3d 38
394-96 [482 P.2d 633, 636-37] (1971).

attaching to, life imprisonment, or of the irrevocableness of an executed sentence of death, or an apprehension that explanatory facts may exist which have not been brought to light, or any other consideration whatever which in the light of the evidence, the duty they owe to the accused and to the state, and the law as explained to them by the judge, appears to them to be important."[78]

People v. Friend, 47 Cal. 2d 749, 767-68 [306 P.2d 463, 474-75] (1957).

See also Williams v. New York, 337 U.S. 241, 248;[79]

Winston v. United States, 172 U.S. 303, 313, quoted in *McGautha v. California*, 402 U.S. 183, 200-01.

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[78]Lord Justice Denning testified before the British Royal Commission on Capital Punishment, "The punishment inflicted for grave crimes should adequately reflect the revulsion felt by the great majority of citizens for them. It is a mistake to consider the objectives of punishment as being deterrent or reformative or preventive and nothing else. . . . The ultimate justification of any punishment is . . . that it is the emphatic denunciation by the community of a crime; and . . . there are some murders which . . . demand the most emphatic denunciation of all, namely the death penalty." Quoted in National Commission on Reform of Federal Criminal Laws, 2 Working Papers 1359 (n.47) (1970).

[79]While "rehabilitation of offenders" has become the primary goal of criminal jurisprudence, "retribution" is still a permissible consideration albeit "no longer the dominant objective." *Williams v. New York, supra* at 248 and n.13. "Description, even approval, of the prevailing mood of penal philosophy (*sed quaere:* whose mood?) is one thing; its elevation to constitutional dogma is quite another." Packer, Comment, *Making the Punishment Fit the Crime*, 77 Harv. L. Rev. 1071, 1078(n.21) (1964). "This Court has never held that anything in the Constitution requires that penal sanctions be designed solely to achieve therapeutic or rehabilitative effects," *Powell v. Texas*, 392 U.S. 514, 530 (plurality opinion of Marshall, J.)

Stripped down to their basic elements, the per
sible objectives of punishment are reduced to f
(1) deterrence, (2) incapacitation (or isolation),
rehabilitation, and (4) retribution.[80] "Retribut
aside, the rational justification for punishment is
dinarily thought to be its utilitarian propensity to p
vent or diminish the commission of offenses, thro
deterrence, incapacitation, rehabilitation, or some co
bination of these."[81]

Rehabilitation of the murderer sentenced to de
is, of course, just as impossible as protection of
absent member of society victimized by the offend
However, petitioner should find little sustenance
his argument in this circumstance, in view of the "da
underside to the rehabilitative ideal." Since, acco
ing to this ideal, the proper aim of the punitive proc
is to reform the criminal so that he may re-enter socie
as a useful member, the permanent incapacitation
the dangerous, unreformable criminal by life term i
prisonment no more serves the rehabilitative aim th
does the death penalty.[82]

What, then, of deterrence—has petitioner concl
sively established that the death penalty deters no si
nificantly greater number of persons from committin
murder than does the prospect of life imprisonment

Before proceeding to the merits of petitioner's alleg
tions, which are founded principally on the sociologica
studies of Professor Sellin (Pet. Br., App. H), it seem

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[80]*Rudolph v. Alabama*, 375 U.S. 889, 891 (dissentin
opinion of Goldberg, J.); *Trop v. Dulles*, 356 U.S. 86, 111 (con
curring opinion of Brennan, J.); *Williams v. New York*, 33
U.S. 241, 248.

[81]Packer, *supra* at 1079.

[82]Packer, *supra* at 1081.

appropriate to join in the following observation by Professor Packer:

> "The legislative judgment inherent in provisions for the death penalty may be open to question, but that hardly seems enough to make it impermissible. One may wonder whether a constitution that 'does not enact Mr. Herbert Spencer's Social Statics' can fruitfully be thought of as enacting Mr. Thorsten Sellin on the death penalty."[83]

The studies upon which petitioner relies conclude that the death penalty exerts no discernable influence on the rate of homicides. The truism that one may prove almost anything with statistics is a circumstance that makes one particularly concerned, in a matter as fraught with strong feelings as the desirability of the death penalty, that the statistician be totally objective and free of bias.[84]

Aside from the shadow which this caveat casts across the findings of non-deterrence, or more accurately the absence of findings of deterrence, a question arises as to the efficacy of the statistical approach in an area as imbued with imponderables as the question of human motivation toward criminal conduct.[85] Social and economic conditions, such as population pressure, unemployment rate, influx of racial and ethnic minorities, in addition to such factors as the efficacy of local law enforcement, climate and weather, and the number of attractive crime targets, must all play a sig-

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[83]Packer, *supra* at 1079-80 (footnote omitted).

[84]Some of the inherent weaknesses in a statistical approach are indicated in the opinion in *Maxwell v. Bishop* 398 F.2d 138 (8th Cir. 1968), *vac'd*, 398 U.S. 262.

[85]*See* Van Den Haag, *Deterrence and the Death Penalty*, 60 J. Crim. L.C. & P.S. 141, 145-46 (1969).

nificant role in determining the number of homicid (particularly robbery-homicides) committed in a giv jurisdiction in a given period of time. The existence so many influential factors, not susceptible of measur ment and correlation, impugns the statistical metho ology upon which petitioner places so much reliance Clearly, the existence of these variables precludes meaningful comparison between general undifferentiate murder statistics and a single proposed causual factor that of the existence of the death penalty in the partic ular jurisdiction.[86]

Secondly, the steady increase in homicides acros the nation,[87] presumably caused by a multitude o social and economic factors, naturally tends to cove

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[86]"It is indeed obvious that a statistical change cannot safely be ascribed to a particular explanation without making sure that no other explanations exist which, either alone or in conjunction with each other or the suggested explanation, could account for the change. And it is impossible to be sure that variations in homicide statistics before and after the abolition of capital punishment are in fact due to abolition, or that, if the figures remain constant, abolition did not have some effect which was cancelled out by some other cause. . . .

"This truth applies to any comparison of the position in a single country at different times; it applies even more to any comparison between different countries, where differences of character, behavior and outlook and different methods of compiling statistics present additional complications. Moreover, in any comparison between countries, it is necessary to establish that the crimes which are compared are identical, and this is rarely possible. If, for example, an attempt were made to compare the murder rate in England, Belgium and the Netherlands, it would be found that 'murder' means something different in each country. . . ." Royal Commission on Capital Punishment 1949-1953 Report 340 (1953).

[87]Murder increased 76% in 1970 over 1960, and the rate of murder per 100 000 inhabitants increased 56% during that period. These rates appear to be increasing in all geographical areas of the country and in metropolitan, suburban, and rural areas. Federal Bureau of Investigation, Uniform Crime Reports—1970 (August 31, 1971) at 7-8.

up the perceptible deterrent effects of the death penalty which might appear in the antiseptic conditions of a social laboratory.

A third objection to the statistical approach is that it measures the homicide rate in terms of the *theoretical* existence of the death penalty (*i.e.*, existing statutes and judgments imposing the punishment of death) rather than in terms of the *actual* existence of the death penalty (*i.e.*, executions carried out). During the previous decade in which the dramatic increase in murders was recorded, as indicated in the preceding footnote, while juries continued at a relatively stable rate to fix the penalty at death[88] the annual number of executions in the United States dwindled from 56 to 0.[89] In this context respondent concurs in petitioner's apparent view (Pet. Br. 6h-7h) that the death penalty would be an even greater deterrent were it not for the inordinate delay existing in the courts today which precludes the application of swift punishment to the offender. Interestingly enough, the homicide rate in California was relatively stable from 1953 to 1963, alternating between 3.3 and 4.0 per 100,000 population. In 1963, the year of the last execution except for the one in 1967, the rate was 3.8. The rate has since climbed to 6.0 in 1968 and 6.9 in 1969.[90]

A fourth possible flaw in the statistical approach arises from the vast majority of the States having the

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[88]U.S. Bureau of Prisons, National Prisoner Statistics Bulletin: Capital Punishment 1930-1968 (August, 1969) at 12 (Table 4). *See* Table C, *infra*, p. 64.

[89]*Id.*, 7 (Table 1).

[90]California Department of Corrections, Executions in California 1943 through 1963 (Appendix II) (1965); California Bureau of Criminal Statistics, Crime and Delinquency in California—1969 (Table II-1) 52 (1970).

death penalty and therefore the possibility arising
a substantial portion of the population of a State
having the death penalty might not be fully aw
of the latter fact.

Last, and perhaps most significant, is the fact
many murders are not deterrable since they repres
irrational crimes, crimes of passion in which a fam
or friends are the victims, and crimes resulting fr
provocation. These murders, which almost never
ceive the death penalty in California,[91] and wh
would probably be undeterrable even if drawing a
quartering were still the punishment,[92] are promis
ously lumped by the statisticians with murders whi
respondent will demonstrate, are frequently deterrab
A study of murder rates and their relationship to
death penalty would be valid only if it were to lim
itself to deterrable homicides involving a course of cri
inal conduct understandingly embarked upon, such
armed robbery, collection of insurance on the victim
life, or kidnaping for ransom.

Some reference has already been made, in refuti
the selective quotation of evidence by one of the *ami*
curiae from a collateral proceeding,[93] to the informe
belief of many who have had first-hand contacts wi

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[91]*See* n. 107, *infra,* and Appendix to Respondent's Brief.

[92]The same point might be made with reference to t
"probably apocryphal" story that when pickpocketing was
capital offense in England, pickpockets plied their trade at t
foot of the gallows as a fellow pickpocket was hanged. &
Bedau, The Death Penalty in America 20 (rev. ed. 1967
Faced with the choice between immediate starvation and intole
able poverty on the one hand, and the possibility of a hangi
sometime in the future on the other, such persons were probab
undeterrable.

[93]*See* pp. 60-61, *infra.*

criminals that the latter in particular situations frequently refrain from killing because of their fear of the death penalty.[94] Many such graphic illustrations are set forth as follows, in the California Supreme Court case of *People v. Love*, 56 Cal. 2d 720 [336 P.2d 33] (1961) (McComb, J., dissenting):

"(b) In the early history of the western states of the United States of America, including California, the death penalty was imposed by the early settlers to stop the rustling of cattle. It is a matter of common knowledge that in the early days of this state the apprehension and hanging of cattle rustlers reduced, and almost stopped, the theft of cattle.

"(c) In the early history of San Francisco, law enforcement broke down and chaotic conditions prevailed. A group of citizens, known as the Vigilantes, undertook to restore order. To do this, they apprehended criminals and after trial promptly executed the guilty parties. Order was restored, and the civil authorities assumed control again. Clearly fear of the death penalty was the basic reason for the restoration of order.

"(d) Any prosecuting attorney or criminal defense attorney or any trial judge who has sat for a substantial period in a department of the superior court devoted to the trial of felony cases knows

[94] "There is no reliable method for determining who has contemplated committing a capital crime but refrained due to the fear of the death penalty as distinguished from other forms of criminal punishment. . . . It is probably impossible to subject deterrence to scientific study in any direct way. . . . The facts cannot be ascertained so that they can be subjected to scientific analysis and interpretation." Florida Spec'l Comm'n for the Study of Abolition of Death Penalty in Capital Cases, Report 13-14 (1965).

that many felons are careful to refrain from arming themselves with a deadly weapon because they do not want to take the chance of killing anyone and suffering death as a penalty.

"A few recent examples of the accuracy of this view are to be found in the following cases involving persons arrested by officers of the Los Angeles Police Department. . . ."[95] *Id.*, 734-35 [366 P.2d at 40-41] (McComb, J., dissenting).

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[95]"(i) Margaret Elizabeth Daly, of San Pedro, was arrested August 28, 1961, for assaulting Pete Gibbons with a knife. She stated to investigating officers: 'Yeh, I cut him and I should have done a better job. *I would have killed him but I didn't want to go to the gas chamber.*'

"(ii) Robert D. Thomas, alias Robert Hall, an ex-convict from Kentucky; Melvin Eugene Young, alias Gene Wilson, a petty criminal from Iowa and Illinois; and Shirley R. Coffee, alias Elizabeth Salquist, of California, were arrested April 25, 1961, for robbery. They had used toy pistols to force their victims into rear rooms, where the victims were bound. When questioned by the investigating officers as to the reason for using toy guns instead of genuine guns, all three agreed that real guns were too dangerous, *as if someone were killed in the commission of the robberies, they could all receive the death penalty.*

"(iii) Louis Joseph Turck, alias Luigi Furchiano, alias Joseph Farino, alias Glenn Hooper, alias Joe Moreno, an ex-convict with a felony record dating from 1941, was arrested May 20, 1961, for robbery. He had used guns in prior robberies in other states but simulated a gun in the robbery here. He told investigating officers that he was aware of the California death penalty although he had been in this state for only one month, and said, when asked why he had only simulated a gun, *'I knew that if I used a real gun and that if I shot someone in a robbery, I might get the death penalty and go to the gas chamber.'*

"(iv) Ramon Jesse Velarde was arrested September 26, 1960, while attempting to rob a supermarket. At that time, armed with a loaded .38 caliber revolver, he was holding several employees of the market as hostages. He subsequently escaped from jail and was apprehended at the Mexican border. While being returned to Los Angeles for prosecution, he made the following statement to the transporting officers: 'I think I might have escaped at the market if I had shot one or more of them. *I probably would have done it if it wasn't for the gas chamber.* I'll

(This footnote is continued on next page)

Similar views have been voiced by another Justice of the California Supreme Court on the basis of his personal experience:

"That the ever present potentiality in California of the death penalty, for murder in the commission of armed robbery, each year saves the lives of scores, if not hundreds of victims of such crimes, cannot I think, reasonably be doubted by any judge who has had substantial experience

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only do 7 or 10 years for this. I don't want to die no matter what happens, you want to live another day.'

"(v) Orelius Mathew Stewart, an ex-convict, with a long felony record, was arrested March 3, 1960, for attempted bank robbery. He was subsequently convicted and sentenced to the state prison. While discussing the matter with his probation officer, he stated: 'The officer who arrested me was by himself, and if I had wanted, I could have blasted him. *I thought about it at the time, but I changed my mind when I thought of the gas chamber.*'

"(vi) Paul Anthony Brusseau, with a criminal record in six other states, was arrested February 6, 1960, for robbery. He readily admitted five holdups of candy stores in Los Angeles. In this series of robberies he had only simulated a gun. When questioned by investigators as to the reason for his simulating a gun rather than using a real one, he replied that *he did not want to get the gas chamber.*

"(vii) Salvador A. Estrada, a 19-year-old youth with a four-year criminal record, was arrested February 2, 1960, just after he had stolen an automobile from a parking lot by wiring around the ignition switch. As he was being booked at the station, he stated to the arresting officers: 'I want to ask you one question, do you think they will repeal the capital punishment law. *If they do, we can kill all you cops and judges without worrying about it.*'

"(viii) Jack Colevris, a habitual criminal with a record dating back to 1945, committed an armed robbery at a supermarket on April 25, 1960, about a week after escaping from San Quentin Prison. Shortly thereafter he was stopped by a motorcycle officer. Colevris, who had twice been sentenced to the state prison for armed robbery, knew that if brought to trial, he would again be sent to prison for a long term. The loaded revolver was on the seat of the automobile beside him, and he could easily have shot and killed the arresting officer. By his own statements to the interrogating officers, however, *he was deterred from this*

(This footnote is continued on next page)

at the trial court level with the handling of such persons. I know that during my own trial court experience, which although not extensive in criminal law, included some four to five years (1930-1934) in a department of the superior court exclusively engaged in handling felony cases, I repeatedly heard from the lips of robbers—some amateurs (no prior convictions), some professionals (with priors)—substantially the same

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action because he preferred a possible life sentence to death in the gas chamber.

"(ix) Edward Joseph Lapienski, who had a criminal record dating back to 1948, was arrested in December 1959 for a holdup committed with a toy automatic type pistol. When questioned by investigators as to why he had threatened his victim with death and had not provided himself with the means of carrying out the threat, he stated, *'I know that if I had a real gun and killed someone, I would get the gas chamber.'*

"(x) George Hewlitt Dixon, an ex-convict with a long felony record in the East, was arrested for robbery and kidnaping committed on November 27, 1959. Using a screw-driver in his jacket pocket to simulate a gun, he had held up and kidnaped the attendant of a service station, later releasing him unharmed. When questioned about his using a screwdriver to simulate a gun, this man, a hardened criminal with many felony arrests and at least two known escapes from custody, indicated his fear and respect for the California death penalty and stated, *'I did not want to get the gas.'*

"(xi) Eugene Freeland Fitzgerald, alias Edward Finley, an ex-convict with a felony record dating back to 1951, was arrested February 2, 1960, for the robbery of a chain of candy stores. He used a toy gun in committing the robberies, and when questioned by the investigating officers as to his reasons for doing so, he stated: *If I had a real gun and killed someone, I would get the gas. I would rather have it this way.'*

"(xii) Quentin Lawson, an ex-convict on parole, was arrested January 24, 1959, for committing two robberies, in which he had simulated a gun in his coat pocket. When questioned on his reason for simulating a gun and not using a real one, he replied that *he did not want to kill someone and get the death penalty.*

"(xiii) Theodore Roosevelt Cornell, with many aliases, an ex-convict from Michigan with a criminal record of 26 years, was arrested December 31, 1958, while attempting to hold up the box office of a theater. He had simulated a gun in his coat

(This footnote is continued on next page)

story: 'I used a toy gun [or a simulated gun or a gun in which the firing pin or hammer had been extracted or damaged] because I didn't want my neck stretched.' (The penalty, at the time referred to, was hanging; death by lethal gas was substituted in 1941.)" (Footnotes omitted.)

People v. Love, 56 Cal. 2d 720, 744 [336 P.2d 33, 46-47] (1961) (Schauer, J., dissenting).[86]

Numerous other incidents reflecting the deterrent effect of the death penalty are related in the Royal Commission on Capital Punishment 1949-1953 Report, at 335-39 (1953), including instances in which a murderer deliberately chose a jurisdiction not having the death penalty as the site of his crime in order to escape capital punishment. *Id.*, 337-38.

Another source notes that shortly before California's last execution, a liquor store owner was attacked by a

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pocket, and when asked by investigating officers why an ex-convict with everything to lose would not use a real gun, he replied, *'If I used a real gun and shot someone, I could lose my life.'*

"(xiv) Robert Ellis Blood, Daniel B. Gridley, and Richard R. Hurst were arrested December 3, 1958, for attempted robbery. They were equipped with a roll of cord and a toy pistol. When questioned, all of them stated that they used the toy pistol because *they did not want to kill anyone, as they were aware that the penalty for killing a person in a robbery was death in the gas chamber.*" (Emphasis in the original.) *Id.*, 735-37 [336 P.2d at 41-42] (McComb, J. dissenting). *See also* Coakley, *Capital Punishment*, 1 Amer. Crim. L. Q. 27, 31-32 (1963); American Bar Association, Section of Criminal Law Proceedings —1959, 15-16.

[86]Justice Schauer noted, "I use robbery as the example. . . . The point of my discussion, however, is equally applicable to the deterrent effect of the death penalty against harming kidnap victims and against murder committed in the perpetration or attempt to perpetrate arson, rape, burglary, mayhem or lascivious acts upon a child. . . ." *Id.*, 744(n.1) [336 P.2d at 46.]

knife-wielding assailant who told him, " 'I'm going to kill you' " but was deterred when his intended victim replied, " 'You may kill me, but you will go to the gas chamber.' "[97]

A recent study conducted by the Los Angeles Police Department confirms the continued validity of the foregoing conclusions, which are drawn from innumerable incidents experienced by those whose contact with criminals is real and direct rather than merely academic.[98]

This study, embodied in a 62-page report, was conducted between December 21, 1970, and February 4, 1971, and involved the interviewing of 316 arrestees. Los Angeles Police Department, Detective Bureau, Administrative Analysis Section, A Study by the Los Angeles Police Department on Capital Punishment 3 (February, 1971). Unarmed suspects were asked why they did not arm themselves, and armed suspects who did not use their weapons were asked why they did not. *Id.*, 61. Of the 316 persons interviewed, 217 denied their crime or refused a statement, primarily out of a desire not to jeopardize their case. *Id.*, 11. The positive statements made by the remaining 99 are classified as follows.

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[97]District Attorneys' and County Counsels' Association of California, Official Position on Capital Punishment 1 (September 2, 1971), quoting the Sacramento Bee, May 5, 1967.

[98]This is not to imply that all those whose experience with the criminal world is purely academic are dubious of the deterrent effect of the death penalty. *See, e.g.*, Van Den Haag, *On Deterrence and the Death Penalty*, 60 J. Crim. L.C. & P.S. 141 (June, 1969).

TABLE D

Los Angeles Police Department Study of the Deterrent Effect of the Death Penalty, February, 1971[99]

1. *Deterred* by fear of death penalty from carrying weapon or operative weapon	50 (50.5%)
2. *Unaffected* by death penalty because it was no longer being enforced	7 (7.07%)
3. *Undeterred* by death penalty, would kill whether it was enforced or not	10 (10.1%)
4. *Unaffected* by death penalty because they would not carry weapon in any event, primarily out of fear of being injured themselves or of injuring someone else	32 (32.3%)

The conclusions drawn from the study are as follows:

> "I. The adoption of an effectively enforced death penalty system is a deterrent in the prevention of homicides. II. Though the death penalty has not been removed from the statutes in California, many suspects believe in reality that no death penalty exists as it is not being enforced. III. Some suspects, while realizing that the California death penalty exists in name only, disclose that the certainty of an executed death penalty sentence would deter them from being armed while committing crimes." *Id.*, 2.

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[99]Los Angeles Police Department, Detective Bureau, Administrative Analysis Section, A Study by the Los Angeles Police Department on Capital Punishment 11 (February, 1971).

The report also notes, "If this study contained only one and not the 50 documented cases supporting the fact that the death penalty is a deterrent, there should be no question of its retention and enforcement. In 1970 in the City of Los Angeles, 394 innocent people were victims of an unlawful execution without the right of due process of law." *Id.*, 1.

On the basis of objective criteria,[100] the report compiled and selected 25 case histories from the 99 individuals who made positive statements. Of the 25 arrestees, 16 were under arrest for robbery, 4 for burglary, 3 for felonious assault, and 2 for rape; and 10 were armed when arrested while 15 were not.[101] *Id.*, 8. The time elapsed between arrest and interview ranged from 1 to 5 days and averaged 2 days.[102] *Id.*, 9.

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[100]Inclusion of cases from different areas of the city to include various types of crimes, juveniles and adults, suspects having as varied ethnic, religious, and economic backgrounds as possible; selection of cases so that no investigator participated in more than one case history; selection of cases from various time periods within the survey; inclusion of as many different arrestee views as possible either showing or not showing behavior deterred by the death penalty. Approximately 97% of the 1,022 officers of the detective bureau were asked to participate in the study. *Id.*, 4-5.

[101]Of the 25, 23 were male adults and 2 were male juveniles; 10 were Caucasian, 13 were Negro, and 2 were Latin; age ranged from 16 years to 40 years, averaging 24.8 years; number of felony arrests per suspect ranged from 1 to 21 and of misdemeanor arrests from 0 to 16, averaging 7.7 felony arrests and 3.9 misdemeanor arrests; and range of time lived in California was from 1 year to 40 years, averaging 14.4 years. *Id.*, 8-9.

[102]The Christmas and New Year holidays occurred during the period covered by the study and caused the average elapsed time between arrest and interview to increase to twice its normal figure. *Id.*, 10.

The statements made by these 25 arrestees are indicated below.[108]

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[108](1) (unarmed robber) "Since in reality there is no death penalty in California, I would kill to obtain what I want." (2) (armed robber) "I used a pellet gun because I didn't want to kill anyone and be put to death in the gas chamber." (3) (unarmed burglar) "I don't carry a gun. I don't want to be shot at by police and am afraid of the death penalty." (4) (armed robber) "I used an unloaded gun in the robbery of a market so I would not hurt anyone and because I am afraid of death penalty." (5) (armed robber) "The gun was unloaded because I didn't want to hurt anyone. I know the punishment would be greater if I shot anyone during a robbery." (6) (armed robber) "I would be afraid to use a gun because of possible death penalty." (7) (armed attempted murderer) "I would have shot it out if necessary, the death penalty is no deterrent." (8) (armed robber) "I used a blank revolver because I'm an ex-con." (9) (unarmed robber) "I would not use a gun, I am afraid of the consequences of the death penalty." (10) (unarmed burglar) "I never owned a gun because I'm afraid of the death penalty." (11) (unarmed burglar) "If I was armed I would not have used the weapon, I am afraid of the gas chamber." (12) (unarmed robber) "I didn't use a gun because I was afraid of being shot." (13) (armed suspect charged with assault with a deadly weapon) "I would kill if I had the chance, I'm not afraid of any courts. They are easy." (14) (unarmed attempted robber) "I am waiting for the death penalty to be removed, then everything is free." (15) (unarmed forcible rapist) "I don't carry a gun because I'm afraid of getting the death penalty." (16) (unarmed burglar) "Because of the death penalty, I would never arm myself." (17) (unarmed forcible rapist) "I have gotten into too much trouble before when I had a gun." (18) (armed suspect charged with assault with intent to commit murder) "Even if a death occurred as a result of a shooting, I am not afraid because no one believes in the death penalty anymore." (19) (unarmed robber) "I am afraid of the death penalty. I wasn't armed." (20) (unarmed robber) "I used a toy gun, I didn't want to hurt anyone." (21) (unarmed robber) "I don't carry a gun, I might shoot someone accidentally, I'm afraid of the death penalty." (22) (unarmed burglar) "I'm an ex-con, I would be an idiot to carry a gun. Punishment would be too great." (23) (armed robber) "I didn't want to hurt anyone, I had an empty gun." (24) (unarmed robber) "I would use weapon if I got into a bind. It doesn't make any difference, no one goes to the gas chamber." (25) (armed robber) "I would use gun if necessary, but I fear the death penalty." *Id.*, 12-40.

Respondent submits that such data cannot accurately be dismissed as "anecdotal impressions of law enforcement" (Pet. Br. 1h, 8h) and that they are instead persuasive proof that the existence of capital punishment, even though unenforced today, acts to deter a substantial number of criminals from making the premeditated decision to arm themselves with operable weapons or from using such weapons to kill their victims. Undoubtedly numerous citizens are alive today only because of the existence of the death penalty, and other victims probably would not have been executed had some criminals not held the accurate belief that the death penalty is not being enforced today.

These circumstances lead one to what is perhaps the most compelling justification for the death penalty. That is that the armed robber or armed burglar, commonly faced with a maximum term of life imprisonment[104] if apprehended, might well consider himself foolish not to kill his victims or other witnesses if by doing so he were to risk only the same penalty, life imprisonment, for murder, while increasing multifold his chances of avoiding apprehension. The armed robber of a one-man liquor store operation would not let our views of the dignity of human life cause him to hestitate for a moment at killing the lonely figure behind the counter at a late hour when no other persons are around to witness such an execution. The same applies to the willingness of the armed robber to kill a police officer in order to avoid apprehension and conviction, when without the death penalty the crim-

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[104]*See, e.g.*, Cal. Pen. Code §§ 213, 461, 671.

inal will risk no added punishment if he does away with his intended captor.[108]

This justification for the death penalty was judicially recognized in *People v. Love*, 56 Cal. 2d 720, 746 [366 P.2d 33, 48] (1961) (Schauer, J., dissenting):

> "[T]he robber can do one thing that will vastly decrease the risk of identification and conviction: he can eliminate the known witnesses—the victims he robs. . . . It cannot be validly disputed that the choice as to [what] he carries—a gun or what looks like a gun—is in case after case controlled solely by his respect for the death penalty. If the punishment he risks for robbery is to be imprisonment—and only imprisonment, even if he eliminates the only witness—it would seem inevitable that the incentive to kill would be greatly increased. The greater chance of escaping any punishment would, in the minds of some at least, outweigh the slighter risk of having the term increased. Many a robber who would take the risk of a longer term would absolutely shun any plan which substituted death for imprisonment."

Justice Schauer concluded that abolition of the death penalty "would be tragically undesirable to the families of the innocent victims who would die violently as a result." *Id.*, 747.

The California Legislature's defeat of bills to abolish capital punishment has been predicated in part upon

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[108] *See* 4 Blackstone, Commentaries 18 (Tucker ed. 1803): "Thus in France the punishment of robbery, either with or without murder, is the same: hence it is, that though perhaps they are therefore subject to fewer robberies, yet they never rob but they also murder. In China, murderers are cut to pieces, and robbers not: hence in that country they never murder on the highway, though they often rob."

precisely such evidence concerning the deterrent effect of the death penalty, including instances of felons deliberately choosing jurisdictions not having the death penalty in which to commit their crimes. *See* California Senate, *Hearing Report and Testimony on Senate Bill No. 1, 1960 Second Extraordinary Session, Which Proposed to Abolish the Death Penalty in California and to Substitute Life Imprisonment Without Possibility of Parole* 133-35, 149-54, 156, 161 (March 9, 1960), referred to in *People v. Love, supra* at 755-56 [366 P.2d at 813-14] (Schauer, J., and McComb, J., dissenting from denial of petition for rehearing).[108] The latter opinion quotes a prominent defense attorney concurring in the conclusion that such evidence is persuasive and observing, "'"Naturally, there can be no statistics produced to demonstrate how many murders were *not committed because the would-be perpetrator feared the death penalty*."'" (Emphasis in the original.) *Id.*, 756 [336 P.2d at 814]. *See also Robinson v. United States*, 324 U.S. 282, 284.

Respondent recognizes that the existence of capital punishment does not operate as a deterrent to *all* criminals. Similarly the British Royal Commission concluded:

> "Prima facie the penalty of death is likely to have a stronger effect as a deterrent to normal human beings than any other form of punishment, and there is some evidence (though no convincing statistical evidence) that this is in fact so. But this effect does not operate universally or uniformly, and there are many offenders on whom it is limited and may often be negligible."
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> Royal Commission on Capital Punishment 1949-1953 Report, 24; *see also supra* at 274.

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[108] *See also* Los Angeles Times, Part I, pp. 1, 24 (June 23, 1971).

"But it would be absurd to claim because it did not deter *all* it did not deter *any*." (Emphasis in the original.) *People v. Love, supra* at 745 [366 P.2d at 47] (Schauer, J., dissenting). The death penalty clearly does operate as a deterrent with respect to a sizable segment of the criminal population, as previously demonstrated. And significantly it is this segment, the majority of whose crimes are committed for pecuniary gain, who commit the types of crimes that so often end up incurring the death penalty when life is taken in connection therewith. As is also indicated in the Appendix to this brief, the crimes of passion, which are rarely deterrable, incur the death penalty only under the most exceptional circumstances and constitute only a minute portion of the death sentences imposed in California.[107]

"[A]ll those who violate penal laws of any kind are by definition undeterred." *Powell v. Texas,* 392 U.S. 514, 531 (plurality opinion of Marshall, J.). However, we can never know the number of persons who

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[107]For example, respondent is informed by the staff of the California State Prison at San Quentin that the crimes of only four of the 98 men currently housed on that institution's Death Row involve the killing of the defendant's wife. Each of these four cases indicates exceptional circumstances and only the last listed can arguably be said to involve an element of passion: (1) Perveler: a former police officer who, with his girlfriend, calculatingly killed his wife and the girlfriend's husband; (2) Archerd: a male nurse who killed six persons, some of them former wives, with insulin injections for the motive of monetary gain; (3) Murphy: who hired another person to accost the defendant's wife on a public road and murder her; (4) Crosier: who killed his common-law wife and was also convicted on a charge of assault with intent to commit murder upon another victim. None of the victims of the four women currently under sentence of death in California were husbands or lovers of the defendants.

More than half of the persons executed since 1943 killed their victims during the course of a robbery or a sexual assault

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are deterred by the death penalty although, as respondent has demonstrated, they are many.

That the death penalty does not deter all does not render it an ineffective, much less an unconstitutional, punishment. As one authority metaphorically illustrates the point,

> "A judge once said, 'The death penalty is a warning, just like a lighthouse throwing its beams out to sea. We hear about shipwrecks, but we do not hear about the ships the lighthouse guides safely on their way. We do not have proof of the number of ships it saves, but we do not tear the lighthouse down."
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> Hoover, *Statements in Favor of the Death Penalty*, in Bedau, The Death Penalty in America 130, 131 (rev. ed. 1967).

In short, there is substantial and highly persuasive evidence, founded upon hard facts and human experience, of the deterrent effect of the death penalty. In concluding that the death penalty has no deterrent effect, the theoretical and statistical approach relied on

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on a female, and another quarter of the number executed killed their victims during the course of a burglary, a quarrel with a crime partner, an attempt at escape, a prison fight, or while resisting arrest. California Department of Corrections, Executions in California 1943 Through 1963 (Table 30) (1965).

See also Report of New Jersey Commission to Study Capital Punishment 8-9 (October, 1964): "The Commission is convinced that capital punishment does deter some potential murderers from committing capital crimes. More importantly, it is believed that the deterrence is most signficant in the area of felony murder and in the area of a truly premeditated crime. . . .

"No punishment would be a deterrent for a crime of passion, or a crime committed by one who is insane. Those are not the persons who generally receive the death penalty. An examination of the crimes by the 14 persons presently awaiting execution in New Jersey . . . makes it abundantly clear that this is so."

by petitioner "goes much too far on the basis of too little knowledge." *Powell v. Texas*, 392 U.S. 514, 521 (plurality opinion of Marshall, J.). As Justice Marshall observed with general reference to the deterrent effect of criminal sanctions,

> "The long-standing and still raging debate over the validity of the deterrence justification for penal sanctions has not reached any sufficiently clear conclusions to permit it to be said that such sanctions are ineffective in any particular context or for any particular group of people who are able to appreciate the consequences of their acts. . . ." *Id.*, 531.

Respondent submits that the foregoing statement has equal validity when applied specifically to the deterrent effect of the death penalty.

Deterrence is not the only function of punishment served better in many instances by the existence of the death penalty than by a maximum available punishment of life imprisonment. Despite petitioner's insistence to the contrary, life imprisonment often provides a woefully inadequate method of protecting society through incapacitation or isolation of the prisoner.

Life imprisonment in California means the prisoner is eligible for parole after serving seven years of his term.[108] Cal. Pen. Code § 3046. The myth that paroled murderers do not kill again evaporates upon a perusal of the case reports. *See, e.g., People v. Peete*, 28 Cal. 2d 306, 308-09 [169 P.2d 924, 926] (1946),

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[108]Life imprisonment without possibility of parole, an available punishment in California only for the offense of aggravated kidnaping (Cal. Pen. Code § 209), may in effect permit parole of the prisoner, since the Governor may commute such a term to one of life with possibility of parole. Cal. Const. art. V, § 8.

cert. denied, 329 U.S. 790; *People v. Purvis*, 52 Cal. 2d 871, 875 [346 P.2d 22, 24] (1959); *People v. Gilbert*, 63 Cal. 2d 690, 702 [408 P.2d 365, 372] (1965), *vac'd* 388 U.S. 263. *See also People v. Robles*, 2 Cal. 3d 205, 213 [466 P.2d 710, 715] (1970); *People v. St. Martin*, 1 Cal. 3d 524, 529 [463 P.2d 390, 392] (1970); *People v. Vaughn*, 71 Cal. 2d 406, 412 [455 P.2d 122, 124] (1969); *In re Cathey*, 55 Cal. 2d 679, 685 [361 P.2d 426, 428] (1961); *People v. Jensen*, 43 Cal. 2d 572, 578 [275 P.2d 25, 30] (1954). Testimony before a California legislative committee has cited the cases of numerous murderers who killed again after being paroled, of prisoners serving life terms who killed in prison, and at least one instance of a prisoner assaulting a correctional officer after the Governor had commuted the prisoner's sentence from death to life.[109] Two prisoners whose death sentences were commuted to life were paroled only to endanger the lives of others and have their parole revoked.[110] And eleven of the persons executed in California between 1944 and 1957 had committed one or more murders prior to the crime for which they were executed, a majority of these defendants having served "life" sentences for these prior murders.[111]

There is always the substantial risk of escape, no matter what precautions are taken to guard the con-

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[109]California Senate, *Hearing Report and Testimony on Senate Bill No. 1, 1960 Second Extraordinary Session, Which Proposed to Abolish the Death Penalty in California and to Substitute Life Imprisonment Without Possibility of Parole* 134-37 (March 9, 1960); Los Angeles Times, Part I, p. 1 (December 13, 1958).

[110]California Department of Corrections, Executions in California 1943 Through 1963 (Appendix V) (1965).

[111]*Id.* (Appendix IV).

victed murderer. For example, the defendant in *People v. Hall*, 199 Cal. 451, 458-59 [249 P. 859, 861] (1926), subsequent to his conviction of first degree murder and sentence to life imprisonment, escaped from San Quentin and thereafter committed another first degree murder. *See also People v. Gilbert, supra; People v. Jensen, supra.* The consequences of an unsuccessful attempt at escape can be just as fatal, as evidenced by the recent escape attempt, at the California State Prison at San Quentin, of a life-term prisoner awaiting trial on a charge of murdering a correctional officer. His effort caused the death of three more correctional officers and two inmates at the hands of himself and other inmates, as well as his own death.[112]

When a prisoner under life sentence is brought to court for further proceedings, the inadequacy of such punishment as protection for society may again become very apparent, as was the case recently when three San Quentin prisoners serving life sentences unsuccessfully attempted to escape from a county courthouse and in the process shot to death the presiding judge and wounded the prosecuting attorney and a juror.[113] Similarly the pendency of new court proceedings against one defendant, already under sentences of death arising from another case, recently provided the occasion for his cohorts to steal 140 firearms intended to be used in an armed assault on the courthouse in an attempt to liberate him.[114]

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[112]Los Angeles Times, Part I, pp. 1, 24 (August 22, 1971).

[113]*Id.*, Part I, p. 1 (August 8, 1970).

[114]*Id.*, Part I, p. 3 (August 25, 1971).

Despite the maximum security on death row, escape attempts by prisoners under sentence of death have also been attempted at San Quentin. In 1967 four prisoners under sentence of death succeeded in sawing through the bars of their cells before being apprehended, and five years earlier six such prisoners did the same, bludgeoned two guards, and seized their guns, holding the guards hostage for three hours in an attempt to escape.[115]

Indeed the phenomenal increase in the number of fatal assaults on correctional officers in California prisons in the last few years,[116] as reflected in the figures below, is indicative of the fact that punishment of prisoners by life imprisonment does not fully protect either our custodial personnel or those inmates who are of necessity confined with violent offenders. The fatalites may be increasing because " 'the inmate of today is more hostile, is immature, prone to act out, and less motivated,' "[117] and there is reason to believe that absent the death penalty there would be a far greater number of prison homicides, particularly by persons serving life sentences.

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[115]Los Angeles Times, Part I, p. 3 (January 31, 1967).

[116]Note also the recent death of 10 guards caused by inmates in a single day at a New York prison. Los Angeles Times, Part I, p. 1 (September 14, 1971); *id.*, Part I, p. 1 (September 15, 1971).

[117]California Assembly, Report of the Select Committee on the Administration of Justice, Parole Board Reform in California 13 (1970). The foregoing legislative committee disputes this conclusion of the California Department of Corrections. *Ibid.*

TABLE E

Homicides in California Prisons, 1965-1971, Committed by Adult Felons[118]

	Correctional Officers Killed by Inmates	Inmates Killed by Other Inmates
1971 (Jan. 1 to Sept. 1)	6	12
1970	2	8
1969	0	15
1968	0	15
1967	0	9
1966	0	3

The chronology which follows provides one of the more graphic illustrations of the need for an enforced death penalty in coping with custodial homicides committed by convicted murderers. The California Supreme Court reversed the judgment of conviction which had imposed two death sentences on a defendant, on a rule of law that was totally novel to the California courts, to wit, that it would henceforth (but retroactively) be deemed improper for a prosecutor or a trial judge to inform the jury of the fact that a defendant under life sentence is eligible for parole after serving seven years imprisonment. (Cal. Pen. Code § 3046.) On retrial of the penalty issue, the jury imposed a life sentence on the murder charges. While in his cell awaiting formal sentencing, the defendant with a mattress cover garrotted a fellow prisoner on the other side of the cell bars, because the prisoner owed him some cigarettes. For the latter offense the defendant was tried by jury and sentenced to death, only to have the Cali-

[118]These figures were obtained from the files of the California Department of Corrections.

fornia Supreme Court, in two separate opinions filed the same day, reverse both cases.[119]

Respondent submits that the unique deterrent and incapacitative effects of the death penalty are apparent from the foregoing discussion. However, the constitutionality of the death penalty, unlike a legislative determination of its desirability, cannot turn upon whether the members of this Court or of some other body find the evidence supportive of the death penalty more persuasive than the evidence supportive of the abolition of that form of punishment. The issue raised by petitioner at most requires this Court to determine whether, as petitioner in essence contends, there is *no substantial evidence* upon which the Congress or the Legislatures of 41 States could reasonably conclude that the death penalty for certain serious offenses serves a legitimate social purpose.

Having shown that there is indeed very substantial evidence supportive of the legislative view that capital punishment is necessary for the protection of society[120] under the conditions presently existing, respondent believes that it has met its burden vis-a-vis this facet of petitioner's constitutional attack on the death penalty.

It is a settled doctrine of constitutional law that the burden of proof is on one who challenges the constitutionality of a statute, and that in the absence of a

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[119]*People v. Morse*, 60 Cal. 2d 631 [388 P.2d 33] (1964); *In re Morse*, 70 Cal. 2d 702 [452 P.2d 601] (1969); *People v. Morse*, 70 Cal. 2d 711 [452 P.2d 607] (1969), *cert. denied*, 397 U.S. 944. Other factually similar cases have occurred in California.

[120]In the sense in which both are expressions of society's need to protect the lives of its citizens, the state's right to execute its most dangerous criminals is analogous to its right to kill the enemy on the battlefield and to the right of the individual to kill in defense of himself or others.

clear showing of unconstitutionality a state statute will be presumed valid. *McGowan v. Maryland*, 366 U.S. 420, 425-26. Moreover, strong policy considerations, involving the balancing of the respective interests which petitioner and respondent seek to protect, dictate that the burden of proof rest upon petitioner.

Compare the consequences of an incorrect decision upholding the death penalty with the consequences that would flow from an incorrect prohibition against the States' employing that form of punishment. It seems so much more important to spare the lives of a substantial number of innocent citizens and law enforcement officers who would be murdered but for the death penalty, than to spare the lives of some of our most vicious murderers. Undoubtedly the consequences of an incorrect decision to *prohibit* the death penalty would be so much more undesirable in both social and moral terms,[121] that this Court should certainly hesitate to overrule hundreds of years of law and human experience upon the meager and speculative showing made by petitioner.

As was stated by one former Justice of the California Supreme Court having substantial trial experience,[122]

> "Because of what my own eyes have seen and my ears have heard I cannot doubt the efficacy of the death penalty as a savior of the lives of victims of robbers, kidnapers, burglars, and criminals of similar dispositions. But if there were

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[121] *See* Van Den Haag, *Deterrence and the Death Penalty*, 60 J. Crim. L.C. & P.S. 141, 146-47 (1969).

[122] *People v. Love*, 56 Cal. 2d 720, 744 [366 P.2d 33, 47] (1961) (Schauer, J., dissenting).

doubt in my mind I should resolve it in favor of protecting the innocent victims of the future rather than sparing the guilty killers of the past."[123]

Moreover, in the event this Court were to adopt petitioner's expansive and fluid interpretation of the Eighth Amendment,

> ". . . it is difficult to see any limiting principle that would serve to prevent this Court from becoming, under the aegis of the Cruel and Unusual Punishment Clause, the ultimate arbiter of the standards of criminal responsibility, in diverse areas of the criminal law, throughout the country."
> *Powell v. Texas*, 392 U.S. 514, 533 (plurality opinion of Marshall, J.).

The adoption of petitioner's approach might well saddle the States with the burden of having to justify various forms of non-capital punishment by establishing that life imprisonment without possibility of parole more effectively serves the aims of punishment than life with possibility of parole, that life is more effective than a fixed or variable term of years, imprisonment more effective than county jail, county jail more effective than probation, and probation more effective than a fine.

Respondent submits that in view of petitioner's inability to make a clear showing that the death penalty serves no legitimate function, the federal Constitution leaves the People of the State of California free to determine through their elected representatives that the protection of society under present conditions requires death as a form of punishment for certain serious offenses.

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[123] *Id.*, 747 [366 P.2d at 48].

D. The Death Penalty Is Not Arbitrarily or Discriminatorily Imposed Upon Racial Minorities, the Poor, or the Uneducated in California; Prisoners Under Sentence of Death Constitute a Representative Cross-Section of California's Criminal Population

Petitioner's challenge to the constitutionality of the death penalty rests in part upon his assertion that such punishment inevitably falls with an uneven hand upon certain less advantaged segments of our society.

Petitioner, *amici*, and the fellow abolitionists whose writings they cite, echo the familiar refrain that universally the death penalty is arbitrarily and discriminatorily imposed upon members of racial minorities, the poor, the uneducated, the mentally deficient,[124] and the "friendless." (Pet. Br. 51-54.)

The foregoing has been so frequently mouthed as gospel truth, albeit without much of an attempt to support it factually, that a challenge to such dogma may seem almost heretical. However, respondent has found that illuminating data drawn from the operation of California's system of criminal justice effectively puts the lie to these blind assertions.

The files of the 102 persons currently housed in the California prison system under sentence of death (3 of whom have penalty retrials pending), as well as the files of the 11 persons presently housed in county jail facilities awaiting penalty retrials, have been examined by counsel for respondent. Four of these persons are women, all of whom are Caucasian and in the state

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[124]Numerous safeguards protect the mentally deficient defendant at all stages in a capital case. *See, e.g.*, Cal. Pen. Code §§ 190.1, 1026-27, 1368-70, 3700-06, 4800-06.

prison system.[125] The 102 state prisoners are comprised of Caucasians (including Mexican-Americans and Puerto Ricans), Negroes, one Filipino, one American Indian, and one Arab. The 11 county prisoners include, in addition to Caucasians and Negroes, one Eskimo.

A comparison of the percentage of Negroes on death row in California with the percentage of Negroes indicated in other pertinent areas of the criminal process[126] yields the following results indicative of the absence of racial bias in the imposition of the death penalty in California.

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[125] *See* California State Prison at San Quentin, Execution Data (September 1, 1971).

[126] The comparison is limited to Negroes since they constitute the largest minority group and the only one for which complete penal statistics are readily available.

TABLE F

Race and the Imposition of the Death Penalty in California[127]

	Caucasian	Negro	Other
Prisoners Executed, All Offenses, 1930-1970	75.7%	18.2%	6.1%
Prisoners Executed, Murder, 1930-1970	75.0%	18.6%	6.4%
Under Sentence of Death, or Awaiting New Penalty Trial, All Offenses, September 1, 1971	65.5%	25.7%	8.8%
Received in Prison, 1st Degree Murder, 1970	60.7%	36.7%	2.6%
Received in Prison, 2nd Degree Murder, 1970	55.8%	39.9%	4.3%
Received in Prison, Non-Vehicular Manslaughter, 1970	55.5%	43.8%	0.7%
Charged in Superior Court with Homicide, 1969	59.2%	38.1%	2.7%
Received in Prison, All Offenses, 1970	69.0%	29.3%	1.7%

[127]Compiled from data (to be published) in California Department of Corrections, California Prisoners—1970 (Table 18A) (197-); California Bureau of Criminal Statistics, Crime and Delinquency in California—1969 (Table VI-9) 117 (1970); U.S. Bureau of Prisons, National Prisoner Statistics Bulletin: Capital Punishment 1930-1968 (August, 1969) at 11 (Table 3).

Similarly, a recent in-depth study of the death penalty in California concludes, contrary to the assertion of one critic,[128] that race plays no part in a jury's determination of punishment in a capital case. Special Issue, *A Study of the California Penalty Jury in First-Degree Murder Cases*, 21 Stan. L. Rev. 1297, 1301, 1307, 1366-68, 1421 (1969).[129]

As is indicated by the figures in the preceding table, a determination whether there is racial discrimination must take into account factors other than the percentage of a particular minority in the general population. Most relevant is the number of offenses, punishable by death, which are committed by the particular minority group.[130]

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[128]Amsterdam, Comment, *Racism in Capital Punishment: Impact of McGautha v California*, 1 Black L. J. 185 (1971): "The long term effect of the McGautha decision is to license a system of capital sentencing in which individual juries are permitted to decree life or death as they wish, free of any legal constraint. In a society which is deeply infected by racism, this discretion inevitably metes out death to black men, in many cases, simply because they are black."

[129]*See also* Report of New Jersey Commission to Study Capital Punishment 9-10 (October, 1964).

[130]Thus even a noted abolitionist concedes, in finding no significant indication of the influence of race in the imposition of the death penalty, that "[f]or many decades there has been ample evidence that Negroes in this country commit three to six times more crimes than their population ratio to whites would lead one to expect." Bedau, *Death Sentences in New Jersey 1907-1960*, 19 Rutgers L. Rev. 1, 19, 21 (1964). Interestingly enough, 27% of the total number of arrests in the United States are of Negroes, as are 36.4% of the number of arrests for the seven major felonies; however, 58.9% of the arrests for murder and non-negligent manslaughter are of Negroes. Federal Bureau of Investigation, Uniform Crime Reports—1970 (Table 32) 131 (August 31, 1971). One observer has concluded, "the circumstances of life surrounding large numbers of Negroes in the United States generate violence, assault, and murder . . ." Schuessler, *The Deterrent Influence of the Death Penalty*, 284 Annals of the Am. Acad. of Pol. and Soc. Sci. 54, 61 (Nov. 1952.)

Some abolitionists, however, while conceding the absence of race as a factor in jury determination of punishment in capital cases, assert "that the race of the offender may be a significant indication of whether a death sentence will be carried out or voided by clemency."[131]

The following figures graphically demonstrate that race plays no part in the granting or denial of clemency in capital cases in California; indeed, the percentage of Negroes receiving commutation of their death sentences is shown to be identical to the percentage of Negroes presently under sentence of death in California (as indicated in the preceding table).

[131]Bedau, 19 Rutgers L. Rev., *supra* at 21.

TABLE G

Race and the Commutation of Death Sentences in California 1959-1971[183]

	Total	Caucasians	Negroes
Governor Edmund G. Brown 1959-1966 (35 Executions)	23	18 (78.3%)	5 (21.7%)
Governor Ronald Reagan 1967-1971 (1 Execution)	1	0 (0%)	1 (100%)
Total	24	18 (*75.0%*)	6 (25.0%)

In the context of the data appearing in the preceding two tables, it is abundantly clear that the death penalty is not discriminatorily applied against Negroes in California, as is so frequently implied in the general charge of universal racial discrimination in the imposition of this form of punishment. Negroes are convicted of 36.7% of the first degree murders and yet comprise only 25% of the death sentences today. Although Negroes comprise only 18.6% of the executions for murder in the last forty years, they have received 25% of the commutations in recent years.

Moreover, what is so often forgotten is the fact that members of racial minorities, the poor, and the uneducated seem to be the persons most in need of the protection of the death penalty, since they are apparently the most frequent victims of murderers. Negroes comprise 54.9% of the murder victims in this country,[184] and although the most recent national poll on

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[183]This data is compiled from the files of the California State Prison at San Quentin.

[184]Federal Bureau of Investigation, Uniform Crime Reports—1970 (Table 22) 118 (August 31, 1971).

the death penalty does not indicate the figures by race, it does show that that form of punishment is favored by a majority of persons in the lowest income, educational, and occupational groups.[184]

It is also clear that the opponents of capital punishment are incorrect in their assertion that the death penalty is discriminatorily imposed upon the poor, or persons of the lowest socio-economic status, because with rare exceptions that punishment purportedly is meted out only to unskilled laborers.[185]

If petitioner were correct in his characterization of California's death row population, it would prove little, for the greatest number of crimes for which death is deemed the appropriate punishment involve a killing for economic gain.[186] To put it more bluntly, as some have more sagely observed wealthy persons do not customarily engage in the type of activity, such as holding up liquor stores, which so often results in the

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[184]Gallup International Inc., Gallup Opinion Index 15 (Report No. 45, March, 1969), reprinted in Erskine, *The Polls: Capital Punishment*, 34 Pub. Op. Q. 290, 292-94 (1970).

[185]Some commentators have viewed the allegedly less-advantaged background of those defendants sentenced to death as indicative of affirmative jury discrimination in singling out such persons for the imposition of capital punishment. *See* Special Issue, *A Study of the California Penalty Jury in First-Degree Murder Cases*, 21 Stan. L. Rev. 1297, 1307, 1367, 1379, 1430-31 (1969). Others have disputed this conclusion. *Cf.* Preface by H. Kalven, *id.*, 1300-01 ("the authors risk being corrupted somewhat by their passion for turning their findings into constitutional arguments against the death penalty").

[186]Appendix to Respondent's Brief; California Department of Corrections, Executions in California 1943 Through 1963 (Table 30) (1965).

needless death of the victim and the fixing of the offender's punishment at death.[127]

In this day when commendably we provide counsel and transcripts and other incidents of a legal defense free of charge to those who cannot afford them, it is absurd to premise an attack on the death penalty on speculation that juries for some reason single out poor people for the extreme penalty.

Examination of the files of the California State Prison at San Quentin indicates that although a large number of prisoners under current sentence of death are unskilled laborers, the occupations indicated for such prisoners also include electronics technician, salesman, student, male nurse, warehouseman, food processor, postal investigator, machinist, butcher, secretary, television technician, security guard, typewriter repairman, psychiatric technical trainee, painter, longshoreman, theater manager, blueprint reader, architect, machine operator, police officer, health spa manager, carpenter, mechanic, public relations, tailor, and pest control worker. Other studies confirm the impression that these individuals represent a broad cross-section

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[127]"If statistics show that more poor persons are executed than rich persons, it could be because more poor than rich commit murders. But it does not follow that they were executed because they were not competently and adequately defended. The simple fact is that rich people rarely commit murder. Obviously they need not commit armed robberies in order to obtain money. If a rich person kills another person, it is apt to be an impulsive act done in a fit of emotional upheaval without the wilfulness and premeditation required to support a murder first degree verdict or judgment." Coakley, *Capital Punishment*, 1 Am. Crim. L. Q. 27, 34 (May, 1963). *See also* Report of New Jersey Commission to Study Capital Punishment 9 (October, 1964); Van Den Haag, *Deterrence and the Death Penalty*, 60 J. Crim. L. C. & P.S. 141, 142(n.4) (1969.)

of skilled and unskilled occupations.[138] One study indicates that the income level of those persons sentenced to death for murder, as well as of those actually executed, is higher than that of the persons who received a sentence of life imprisonment for first degree murder.[139]

Data on the education of California prisoners under sentence of death or awaiting new penalty trials is available in the files of all but five cases and indicates a median (and average) education of 10th grade.[140] Seven individuals have in excess of a 12th grade education.

The foregoing dispels the myth that it is, with few exceptions, the uneducated defendant upon whom the death penalty is imposed. Although figures on the actual educational attainment of prisoners not under death sentence is unavailable, it is interesting to note that in California "the median grade achievement scores of the male felons newly received from court have been at the eighth grade level."[141]

Respondent's examination of the files disclosed that only fragmentary I.Q. data are available, mainly because a large number of prisoners refuse to be tested,

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[138]*See* Einstoss, "Most Men on Death Row Are Skilled Workmen," Los Angeles Times, Part II, p. 6 (May 26, 1967); California Department of Corrections, Executions in California 1943 Through 1963 (Table 7) (1965); Coakley, *supra* at 34-35(n.13).

[139]Coakley, *supra.*

[140]*See also* California Department of Corrections, Executions in California 1943 Through 1963 (Table 5) (1965), indicating that the greatest number of prisoners executed during the period covered were in the grade 9-11 range.

[141]California Department of Corrections, California Prisoners—1968, 36 (1969).

but that such data ranged from a low of 70 I.Q. (two individuals) to a high of 136 (two individuals). A more complete sampling directed to the intelligence level of California prisoners executed between 1943-1963 (only one prisoner has been executed in the State since 1963) indicates that, in the 128 cases (out of the total 158) in which data was available, the vast majority (80.4%) came within the range of normal intelligence level with 8.6% borderline and 2.4% defective, and 7.0% superior and 1.6% very superior.[142]

Petitioner's attack on the manner in which juries decide which murder defendants are to receive the death penalty was in essence answered by this Court's opinion in *McGautha v. California*, 402 U.S. 183, and respondent will add only the observation that every one of the capital cases reviewed by the California Supreme Court since 1965 indicates the presence of at least one aggravating circumstance that would call for the death penalty under the standards of the Model Penal Code drafted by the American Law Institute and set forth as an appendix to the opinion in *McGautha, supra* at 222-25. *See* Appendix to Respondent's Brief. Thus with respect to California there is no basis for petitioner's assertion that juries may be arbitrarily im-

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[142]California Department of Corrections, Executions in California 1943 Through 1963 (Table 6) (1965). *See also* Report of New Jersey Commission to Study Capital Punishment 9 (October, 1964): "From all the information studied by the Commission so far as it affects the State of New Jersey, and from similar information found for a number of states which have made studies, the Commission believes that the intellectual attainment of persons sentenced to death and executed is a rough cross-section of that of the prison population at large."

posing the death penalty where there is little justification for it.[143]

Although the possibility of error is present whenever a decision between life and death must be made, *Williams* v. *New York*, 337 U.S. 241, 251-52, neither petitioner nor *amici* have called the attention of this Court to a single case in which an innocent defendant has been executed under the procedural safeguards available in our American system of justice[144] at the trial, on appeal, and in clemency proceedings.[145] But were such a miscarriage of justice to occur, it would, like the conviction of an innocent man in a non-capital case, suggest improvement of the foregoing procedures rather than abolition of the death penalty or the closing of our prisons.

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[143]Paradoxically petitioner argues (Pet. Br. 6) that the small portion of murderers sentenced to death indicates arbitrariness in the determination of penalty. Undoubtedly if a large portion were to be sentenced to death, petitioner would argue that the failure of juries to distinguish among offenders and offenses amounted to cruel and unusual punishment. Respondent submits that the decision of juries to limit the supreme penalty to the most heinous of murders shows that juries are discriminating rather than discriminatory.

[144]The assertion at pages 20-21 of the brief of *amici* Nat'l Council of Churches of Christ, *et al.*, that Caryl Chessman's execution would have been barred by later judicial decisions reinterpreting the elements of his crime (kidnaping) is untrue, since that reinterpretation was founded on a statutory amendment effective long after Chessman was convicted, and his case was properly decided under the law applicable at the time. *See People v. Daniels*, 71 Cal. 2d 1119, 1139 [459 P.2d 225, 238] (1969).

[145]*See, e.g.*, Cal. Pen. Code. §§ 1181(6)(7), 1239(b), 4801, 4812. Existing California statutes and case law indicate the truth of the statement, "Trials are more likely to be fair when life is at stake . . ." Van Den Haag, *Deterrence and the Death Penalty*, 60 J. Crim. L. C. & P.S. 141, 142 (1969). *See also Stein v. New York*, 346 U.S. 156, 196.

Nor have any but the most aberrant and isolated instances been shown involving individuals who kill in order to be killed by the state.

And the negligible rate of suicides by prisoners under sentence of death is not compared to the equally unknown rate of suicides by prisoners serving terms of life imprisonment[146] and may well be lower, bearing out the point of view of some that a true sentence of life without possibility of parole may be a punishment more cruel than death.[147]

In short, petitioner has failed to demonstrate anything arbitrary, discriminatory, or unfair in the manner in which the death penalty is imposed. Indeed it is evident that prisoners under sentence of death constitute a strikingly representative cross-section of California's criminal population.

E. Death Is Not a Cruel and Unusual Punishment for Petitioner, the Unrepentant Perpetrator of Three Known, Separate Murders Committed for Pecuniary Gain and Sexual Gratification

It remains only to consider briefly a few of the salient aspects of petitioner's own case in relation to his claim that the death penalty for murder constitutes cruel and unusual punishment.

Initially one is confronted with the circumstance that on three separate occasions, petitioner wantonly

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[146]In a recent seven-year period 195 prisoners in the custody of correctional and law enforcement agencies died as the known result of suicide in the State of California. California Bureau of Criminal Statistics, Death in Custody—California 1962-1968 (Table III) 9 (1969).

[147]One defendant sentenced to death in 1958, and in 1960 commuted to life without possibility of parole, committed suicide in 1964. California Department of Corrections, Executions in California 1943 through 1963 (Appendix V) (1965.)

extinguished human life—first the life of Kathleen Nell Dodd and her five month-old male fetus, in a savage knife attack after he had raped and robbed her; secondly the life of Clyde J. Hardaway, in a sordid scene in which the victim was shot in the forehead as he kneeled to perform a sexual act upon petitioner; and thirdly the life of Mary Winifred Eaton, a woman in her sixties, whose age and previous befriending of petitioner was not enough to spare her from being raped and fatally stabbed by the venerrally-diseased petitioner. Added to these known murders is a host of violent felonious behavior going back to petitioner's childhood and occurring between repeated incarcerations and failures at rehabilitation. (R. 1375, 1966-67.) Even petitioner's present counsel concede that his crimes were "ghastly" and "aggravated" and forego any "claim that if the death penalty can constitutionally be inflicted for any such crime [civilian and peacetime], it cannot be inflicted, upon this petitioner." (Pet. Br. 4-5.)

There is no indication that petitioner's race played a part in the decision of the trier of fact, a judge, to fix petitioner's punishment at death. On the contrary, the trial judge's findings (R. 4890-4992), set forth in part at pp. 29-34 *infra*, indicate a compassionate consideration for petitioner's not-very-disadvantaged background and race. These findings, made on evidence summarized at the outset of this brief, make it indisputably clear that petitioner was not sentenced to death because of his race or socio-economic background. He received an education, was considered intelligent and not in any way psychotic or mentally defective, and although usually unemployed was apparently so at his own choosing, preferring to live off the hard-earned money of his elderly mother, who did housework for a living. As

indicated in the findings of the trial court (R. 4900-01, *infra* p. 32), petitioner had the opportunity to emulate the commendable accomplishments of his two sisters. (R. 4604.)

Petitioner received an abundance of due process in excess of anything required by the Constitution. Two attorneys (whose competence the court recognized) were appointed to represent him, a third was appointed to consult with him on a limited basis, and $1850.00 was allowed defense counsel as expenditures for investigation, psychiatric diagnosis, and medical tests. Also granted were petitioner's motions for discovery of the prosecution's evidence.[148] Yet the defense was unable to produce any evidence indicating insanity or diminished mental capacity on petitioner's part.

Only a wealthy man could have afforded such a trial which, excluding pretrial and sentencing proceedings, extended with some interruptions from November 24, 1965, to March 16, 1966. (R., Cl. Tr. II, pp. 115, 274.) And can it for a moment be imagined that had petitioner been Caucasian, college-educated, and professionally employed, these circumstances would have caused the trier of fact to sentence petitioner to only life imprisonment in the face of petitioner's unrepentant attitude toward three brutal slayings and an assortment of other violent offenses? Particularly significant is petitioner's callous bragging to other inmates about the murders and petitioner's statement, while awaiting trial on the present charges, to a fellow inmate, that "if they can't get him out of that county jail, he was going to kill someone else." (R. 1133.) This demonstrates the validity of the conclusion, reached by the

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[148](R., Cl. Tr. I, pp. 4, 6, 20; Cl. Tr. II, pp. 115, 269-70; Cl. Tr. III, pp. 3, 19; R. 3373.)

chiatrists and the psychologist, that the likelihood
petitioner, a person without mental disorders,
ld ever be rehabilitatable was very slight. (See pp.
26, *infra*.) There certainly can be little doubt
o whether petitioner would kill again if paroled
a life sentence.

inally, are petitioner and the other prisoners under
ence of death truly the "friendless?" (Pet. Br. 54.)
le from all that was accorded petitioner at his trial
on appeal in the California Supreme Court, such
ssertion has a hollow if not ironic ring on the basis
e of petitioner's having 14 counsel of record in the
ent proceedings before this Court, quantitatively
rfing the resources of the State,[149] in addition to
having the support of nine briefs *amici curiae* on
lf of a multitude of individuals and organizations.

learly the death penalty is not cruel and unusual
shment, either as a general proposition or as im-
d under the particular facts of petitioner's case.

CONCLUSION

an era characterized by rising crime rates, mass
gs, inmate homicides, revolutionary bombings of
c buildings, and the assassination of political
rs and law enforcement officers,[150] it would be
y inappropriate for a legislature to contravene the
of the people by abolishing capital punishment,
one for this Court under the aegis of the Eighth

ee also Maxwell v. Bishop, 398 F.2d 138, 141 (8th Cir.
, *vac'd*, 398 U.S. 262.

he number of law enforcement officers murdered in the
States rose from 37 in 1961 to 100 in 1970. Federal
of Investigation, Uniform Crime Reports—1970, 44
st 31, 1971.)

Amendment to decree that this form of punishment, expressly sanctioned by the wording of the Constitution and a long line of decisions by this Court, is now forbidden to the people of the various States.

A justice of the California Supreme Court once noted,

"Probably all of us who have thought on the subject—and particularly those of us who have some responsibility in these cases (even as remote as it is at the appellate level)—devoutly wish that the death penalty were no longer necessary. But we have not yet reached the state which Sir Thomas More envisioned . . .[of] a Utopian government."[151]

As Justice Harlan stated for the Court in *McGautha v. California*, 402 U.S. 183, the Court's "function is not to impose on the States, *ex cathedra*, what might seem to us a better system for dealing with capital cases. Rather, it is to decide whether the Federal Constitution proscribes the present procedures . . . in these cases." *Id.*, 195-196. "[T]he question for decision is not whether we personally approve the procedures followed . . . The question is whether those procedures fall below the minimum level the Fourteenth Amendment will tolerate." *Spencer v. Texas*, 385 U.S. 554, 569 (Stewart, J., concurring.)

Respondent earnestly maintains that nothing has happened in the 180-year history of the Constitution, or in the 300-year history of the imposition of capital punishment in this nation, which can alter the fact of the Framers' contemplation of the death penalty as a

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[151]*People v. Love*, 56 Cal. 2d 720, 745 [366 P.2d 33, 47] (1961) (Schauer, J., dissenting).

orm of punishment of necessity available to the States or the protection of society. It is therefore urged that he judgment of the California Supreme Court, upholding petitioner's judgment of conviction imposing the eath penalty, be affirmed in its entirety.

Respectfully submitted,

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APPENDIX.

TABLE H.

Defendants Under Sentence of Death Reviewed by the California Supreme Court 1965-1971.[1a]

	DIRECT APPEALS			COLLATERAL ATTACKS WHERE ORDER TO SHOW CAUSE ISSUED	
	Total	Affirmed in Entirety	Death Penalty, Conviction, or Both Set Aside	Writ Denied	Writ Granted—Death Penalty, Conviction, or Both Set Aside
ept 1 1967	50	25(50%)	25(50%)	0	4
ept 1 1971	60	19(32%)	41(68%)	0	15
ept 1 1971	110	44(40%)	66(60%)	0	19

CAPITAL CASES REVIEWED BY THE CALIFORNIA SUPREME COURT BETWEEN SEPTEMBER 1, 1965, AND SEPTEMBER 1, 1967

A. *Direct Appeals Affirmed in Entirety*

People v. Jacobson, 63 Cal. 2d 319 (1965) [405 P. 2d 555] (premeditation and exceptional heinousness

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[1a]Some defendants appear in this table more than once in hat their judgment imposing the death penalty was considered successive proceedings by the court. Defendant Gilbert in *eople v. Gilbert*, 63 Cal. 2d 690, appears in one instance as oth an affirmance and a reversal due to the fact that in a single roceeding one count imposing the death penalty was reversed nd another such count affirmed. The cases comprising this ible are collected below, with references to which theory, or hich felony under the felony-murder rule, formed the basis for ing the murder in the first degree. Other distinguishing feaures of the offense particularly pertinent to the determination f penalty are also indicated. In approximately 5% of the cases ry trial was waived and the issue of penalty tried to the court. The vast majority of these 129 cases involves the offense of rst-degree murder, and the remaining few involve the offenses kidnapping for gain with bodily harm or assault with a deadly eapon or with force likely to produce great bodily injury, by a isoner under life sentence. Cal. Penal Code, §§ 187, 209, 00.

—drowning of 21-month-old child; *commuted* by Governor in 1966); *People v. Cotter*, 63 Cal. 2d 386 (1965) [405 P. 2d 862] (robbery; *commuted* by Governor in 1966); *People v. Mathis*, 63 Cal. 2d 416 (1965) [406 P. 2d 65] (robbery); *People v. Gilbert*,[2a] 63 Cal. 2d 690 (1965) [408 P. 2d 365], *vac'd*, 388 U.S. 263 (robbery, victim police officer); *People v. Smith*, 63 Cal. 2d 779 (1966) [409 P. 2d 222] (burglary, double murder, both victims police officers); *People v. Mitchell*, 63 Cal. 2d 805 (1966) [409 P. 2d 211] (robbery, victim police officer) [defendant sole person to be executed in California from 1964 to the present]; *People v. La Vergne*, 64 Cal. 2d 265 (1966) [411 P. 2d 309] (robbery); *People v. Anderson*, 64 Cal. 2d 633 (1966) [414 P. 2d 366] (robbery, and attempt to kill two police officers and a fourth victim); *People v. Talbot*, 64 Cal. 2d 691 (1966) [414 P. 2d 633] (robbery, mutilation); *People v. Reeves*, 64 Cal. 2d 766 (1966) [415 P. 2d 35] (robbery, and attempt to murder a second victim, court trial); *People v. Seiterle*, 65 Cal. 2d 333 (1966) [420 P. 2d 217] (robbery, double murder); *People v. Roberts*, 65 Cal. 2d 514 (1966) [421 P. 2d 420] (robbery); *People v. Thomas*, 65 Cal. 2d 698 (1967) [423 P. 2d 233] (arson and exceptional heinousness—molotov cocktail thrown into bedroom of three-year-old victim; *commuted* by Governor in 1967); *People v. Tahl*, 65 Cal. 2d 719 (1967) [423 P. 2d 246] (robbery, double murder, subsequent murder, subsequent attempt to kill fourth person, and statement of intention to kill fifth person); *People v. Saterfield*, 65 Cal. 2d 752 (1967) [423 P. 2d 266] (premeditation, double murder, prior murder convic-

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[2a]This case is listed twice, as an affirmance as to one murder count and as a reversal as to the other murder count.

tion); *People v. Arguello*, 65 Cal. 2d 768 (1967) [423 P. 2d 202] (robbery, exceptional heinousness—82-year-old victim beaten to death with brick and hammer); *People v. Hillery*, 65 Cal. 2d 795 (1967) [423 P. 2d 208] (rape of 15-year-old victim); *People v. Sanchez*, 65 Cal. 2d 814 (1967) [423 P. 2d 800] (murder of civilian prison employee by prisoner serving life sentence); *People v. Eli*, 66 Cal. 2d 63 (1967) [424 P. 2d 356] (rape); *People v. Lookadoo*, 66 Cal. 2d 307 (1967) [425 P. 2d 208] (robbery and exceptional heinousness—setting live victim on fire with burning gasoline, court trial; *commuted* by Governor in 1966); *People v. Hines*, 66 Cal. 2d 348 (1967) [425 P. 2d 557] (robbery); *People v. Hill & Saunders*, 66 Cal. 2d 536 (1967) [426 P. 2d 908] (robbery, second murder attempted, two capital defendants); *People v. Modesto*, 66 Cal. 2d 695 (1967) [427 P. 2d 788] (double murder, exceptional heinousness—committing sexual acts upon,[a*] and beating to death, nine and twelve-year-old victims with sledgehammer, prior murder); *People v. Massie*, 66 Cal. 2d 899 (1967) [428 P. 2d 869] (robbery, second murder attempted, court trial).

B. *Direct Appeals Reversed as to Death Penalty, Conviction, or Both*

People v. Anderson, 63 Cal. 2d 351 (1965) [406 P. 2d 43] (premeditation, sexual acts upon ten-year old female victim); *People v. Price*, 63 Cal. 2d 370 (1965) [406 P. 2d 55] (robbery, double murder, both

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[a*]Rape, sodomy, sexual perversion, and other sexual offenses punishable under the California Penal Code, when committed upon a child under the age of fourteen, are punishable under section 288 of the code as the separate offense of lewd or lascivious acts upon the body of a child under the age of fourteen.

victims police officers); *People v. Polk & Gregg*, 63 Cal. 2d 443 (1965) [406 P. 2d 641] (robbery, heinous mutilation of victim, and evidence of prior homicides by one of the two capital defendants); *People v. Luker*, 63 Cal. 2d 464 (1965) [407 P. 2d 9] (robbery); *People v. Stockman*, 63 Cal. 2d 494 (1965) [407 P. 2d 277] (robbery); *People v. Arguello*, 63 Cal. 2d 566 (1965) [407 P. 2d 661] (robbery, exceptional heinousness—82-year-old victim beaten to death with brick and hammer); *People v. Gilbert*, 63 Cal. 2d 690 (1965) [408 P. 2d 365] (robbery); *People v. Ketchel & Sears*, 63 Cal. 2d 859 (1966) [409 P. 2d 694] (robbery, victim police officer, two capital defendants); *People v. Treloar*, 64 Cal. 2d 141 (1966) [410 P. 2d 620] (robbery); *People v. Ford*, 65 Cal. 2d 41 (1966) [416 P. 2d 132] (robbery, premeditation, victim police officer); *People v. Butler*, 65 Cal. 2d 569 (1967) [421 P. 2d 703] (robbery); *People v. Goedecke*, 65 Cal. 2d 850 (1967) [423 P. 2d 777] (premeditation, quadruple murder); *People v. Nicolaus*, 65 Cal. 2d 866 (1967) [423 P. 2d 787] (premeditation, triple murder); *People v. Spencer*, 66 Cal. 2d 158 (1967) [424 P. 2d 715] (robbery, second murder attempted); *People v. Griffin*, 66 Cal. 2d 459 (1967) [426 P. 2d 507] (rape); *People v. Gonzales*, 66 Cal. 2d 482 (1967) [426 P. 2d 929] (robbery, second murder attempted); *People v. Pennington*, 66 Cal. 2d 508 (1967) [426 P. 2d 942] (double murder and sexual acts upon a female murder victim under the age of fourteen); *People v. Bandhauer*, 66 Cal. 2d 524 (1967) [426 P. 2d 900] (robbery); *People v. Wilson*, 66 Cal. 2d 749 (1967) [427 P. 2d 820] (premeditation, double murder); *People v. Vanum*, 66 Cal. 2d 808 (1967) [427 P. 2d 772] (rob-

bery); *People v. Powell & Smith*, 67 Cal. 2d 32 (1967) [429 P. 2d 137] (premeditation, double murder, both victims police officers, two capital defendants); *People v. Jackson*, 67 Cal. 2d 96 (1967) [429 P. 2d 600] (rape, offense committed only a few days after defendant's release from nine-year prison term, court trial).

C. *Writs Denied After Issuance of Order to Show Cause*

None.

D. *Writs Granted Setting Aside Death Penalty, Conviction, or Both*

In re Spencer, 63 Cal. 2d 400 (1965) [406 P. 2d 33] (robbery); *In re Varnum*, 63 Cal. 2d 629 (1965) [408 P. 2d 97] (robbery); *In re Pike*, 66 Cal. 2d 170 (1967) [424 P.2d 724] (robbery, victim police officer); *In re Shipp*, 66 Cal. 2d 721 [427 P. 2d 761] (robbery, victim killed for 10¢).

II CAPITAL CASES REVIEWED BY THE CALIFORNIA SUPREME COURT BETWEEN SEPTEMBER 1, 1967, AND SEPTEMBER 1, 1971

A. *Direct Appeals Affirmed in Entirety*

People v. Lara, 67 Cal. 2d 365 (1967) [432 P.2d 202] (robbery); *People v. Beivelman*, 70 Cal. 2d 60 (1968) [447 P.2d 913] (robbery and exceptional heinousness—victim beaten to death with hammer); *People v. Durham & Robinson*, 70 Cal. 2d 171 (1969) [449 P.2d 198] [Robinson sole capital defendant] (robbery, defendant parole escapee, victim police officer); *People v. Aikens*, 70 Cal. 2d 369 (1969) [450 P.2d 258] (rape and robbery, double murder, prior murder, court trial) [the case at bar];

People v. Varnum, 70 Cal. 2d 480 (1969) [450 P.2d 553] (robbery); *People v. Hill*, 70 Cal. 2d 678 (1969) [452 P.2d 329] (robbery, rape, and sodomy upon pregnant victim); *People v. McGuatha*, 70 Cal. 2d 770 (1969) [452 P.2d 650] (robbery, prior murder); *People v. Tolbert*, 70 Cal. 2d 790 (1969) [452 P. 2d 661] (rape and sodomy); *People v. Coogler*, 71 Cal. 2d 153 (1969) [454 P.2d 686] (robberies, double murders); *People v. Nye*, 71 Cal. 2d 356 (1969) [455 P.2d 395] (robbery and rape, exceptional heinousness—victim stabbed 37 times); *People v. Mabry*, 71 Cal. 2d 430 (1969) [455 P.2d 759] (burglary, victim police officer, several prior felony convictions including prison escape); *People v. Miller*, 71 Cal. 2d 459 (1969) [455 P.2d 377] (commission of sexual acts upon eight-year-old victim); *People v. Pike*, 71 Cal. 2d 595 (1969) [455 P.2d 776] (robbery, victim police officer); *People v. Robles*, 71 Cal. 2d 924 (1969) [458 P.2d 67] (robbery and premeditation); *People v. Floyd & Milton*, 1 Cal. 3d 694 (1970) [464 P.2d 64] (robbery of municipal bus driver, two capital defendants); *People v. King*, 1 Cal. 3d 791 [463 P.2d 753] (robbery); *People v. Terry*, 2 Cal. 3d 362 (1970) [466 P.2d 961] (robbery and exceptional heinousness —pharmacist stabbed 17 times with scissors and shot four times); *People v. Archerd*, 3 Cal. 3d 615 (1970) [477 P.2d 421] (murder of six persons by insulin injections.)

B. *Direct Appeals Reversed as to Death Penalty, Conviction, or Both*

Peope v. Bassett, 69 Cal. 2d 122 (1968) [443 P.2d 777] (premeditation, double murder); *People v. McDowell*, 69 Cal. 2d 737 (1968) [447 P.2d 97]

(robbery); *People v. White*, 69 Cal. 2d 751 (1968) [446 P. 2d 993] (robbery and rape); *People v. Chacon & Noah*, 69 Cal. 2d 765 (1968) [447 P.2d 106] (near-fatal assault by prisoners serving life terms, numerous prior felonies committed by each of the two capital defendants, including murder by one and assault with a deadly weapon on a police officer by another); *People v. Anderson*, 70 Cal. 2d 15 (1968) [447 P.2d 942] (premeditation, sexual acts upon ten-year-old female victim); *People v. Risenhoover*, 70 Cal. 2d 39 (1968) [447 P.2d 925] (robbery and premeditation); *People v. Bradford*, 70 Cal. 2d 333 (1969) [450 P.2d 46] (premeditation and exceptional heinousness—death caused by pouring sulphuric acid on victim); *People v. Terry*, 70 Cal. 2d 410 (1969) [454 P.2d 36] (robbery, victim police officer); *People v. Teale*, 70 Cal. 2d 497 (1969) [450 P.2d 564] (robbery); *People v. Sanchez*, 70 Cal. 2d 562 (1969) [451 P.2d 74] (murder of civilian prison employee by prisoner serving life term); *People v. Fain*, 70 Cal. 2d 588 (1969) [451 P.2d 65] (rape and sex perversion, with prior rape and prior attempted rape); *People v. Morse*, 70 Cal. 2d 711 (1969) [452 P.2d 607] (premeditation, while awaiting sentencing on retrial for two capital murders defendant killed fellow prisoner who owed him cigarettes); *People v. Osuna & Gorman*, 70 Cal. 2d 759 (1969) [452 P.2d 678] (robbery, two capital defendants); *People v. Goodridge*, 70 Cal. 2d 824 (1969) [452 P.2d 637] (rape and sodomy, committed probably after victim's death, 107 stab wounds); *People v. Graham & Shepard*, 71 Cal. 2d 303 (1969) [455 P.2d 153] [Shephard only capital defendant] (robbery); *People v. O'Brien*, 71 Cal. 2d 394 (1969)

[456 P.2d 969] (robbery, victim police officer
People v. Vaughn, 71 Cal. 2d 406 (1969) [455 P.2
122] (assault on prison guard by prisoner serving li
sentence, defendant having previously killed three fe
low prisoners); *People v. Quicke*, 71 Cal 2d 5(
(1969) [455 P.2d 787] (premeditation and exce
tional heinousness—subsequent sexual intercourse wi
victim's corpse); *People v. Williams*, 71 Cal 2d 61
(1969) [456 P.2d 633] (robbery, strangulation
People v. Ketchel, 71 Cal. 2d 635 (1969) [456 P.2
660] (robbery, victim police officer); *People*
Schader, 71 Cal. 2d 761 (1969) [457 P.2d 841] (rol
bery, victim police officer); People v. McClellan, 7
Cal. 2d 793 (1969) [457 P.2d 871] (robbery, doubl
murder); *People v. Stanworth*, 71 Cal. 2d 820 (1969
[457 P.2d 889] (rape, double murder of 14 and 15
year-old girls, with numerous other prior and subse
quent acts of rape, sexual perversion, and robbery)
People v. Gardner, 71 Cal. 2d 843 (1969) [457 P.2
575] (robbery); *People v. Washington*, 71 Cal. 2
1061 (1969) [458 P.2d 479] (arson, three othe
murders attempted, exceptional heinousness — defend
ant poured gasoline into children's bedroom and lit it
17 month-old victim dying two weeks later); *Peopl
v. Daniels & Simmons*, 71 Cal. 2d 1119 (1969) [45
P.2d 225] (three counts against two capital defendant
of kidnaping for gain with bodily harm, each in th
vicinity of a university campus and involving rape, an
one involving sexual perversion; prior rapes and prio
kidnaping); *People v. Coleman*, 71 Cal. 2d 115
(1969) [459 P.2d 248] (robbery); *People v. Wash
ington*, 71 Cal. 2d 1170 (1969) [459 P.2d 259]
(robbery); *People v. Brawley & Baker*, 1 Cal. 3d
277 (1969) [461 P.2d 361] (robbery, two capital

defendants); *People v. Mosher*, 1 Cal. 3d 379 (1969) [461 P.2d 659] (robbery and rape); *People v. Wilson* 1 Cal. 3d 431 (1969) [462 P.2d 22] (premeditation, double murder); *People v. St. Martin*, 1 Cal. 3d 524 (1970) [463 P.2d 390] (fatal assault on prisoner by another prisoner serving a life term for a previous murder and robbery); *People v. Bandhauer*, 1 Cal 3d 609 (1970) [463 P.2d 408] (robbery); *People v. MacPherson*, 2 Cal. 3d 109 (1970) [465 P.2d 17] (robbery); *People v. Robles*, 2 Cal. 3d 205 (1970) [466 P.2d 710] (murder, premeditated and fatal assault on prisoner by another prisoner serving a life term for prior murder and assault with intent to commit murder); *People v. Tidwell (William)*, 3 Cal. 3d 62 (1970) [473 P.2d 748] (robbery, triple murder); *People v. Tidwell (Robert)*, 3 Cal. 3d 82 (1970) [473 P.2d 762] (robbery, triple murder).

C. *Writs Denied After Issuance of Order to Show Cause*

None.

D. *Writs Granted Setting Aside Death Penalty, Conviction, or Both*

In re Anderson & Saterfield, 69 Cal. 2d 613 (1968) [447 P.2d 117] (as to Anderson: robbery, and attempt to kill two police officers and a fourth victim; as to Saterfield: premeditation, double murder, prior murder conviction); *In re Mathis*, 70 Cal. 2d 467 (1969) [450 P.2d 290] (robbery); *In re Morse*, 70 Cal. 2d 702 (1969) [452 P.2d 601] (premeditation, double murder); *In re Arguello*, 71 Cal. 2d 13 (1969) [452 P.2d 921] (robbery, exceptional heinousness—82-year-old victim beaten to death with brick and hammer); *In re Eli*, 71 Cal. 2d 214 (1969) [454 P.2d

337] (rape); *In re Seiterle*, 71 Cal. 2d 698 (1969) [456 P.2d 129] (robbery, double murder); *In re Hillery*, 71 Cal. 2d 857 (1969) [457 P.2d 565] (rape of 15-year-old victim); *In re Hill & Saunders*, 71 Cal. 2d 997 (1969) [458 P.2d 449] (robbery, second murder attempted, two capital defendants); *In re Tahl*, 1 Cal. 3d 122 (1969) [460 P.2d 449] (robbery, double murder, subsequent murder, subsequent attempt to kill fourth person, and statement of intention to kill fifth person); *In re Kemp*, 1 Cal. 3d 190 (1969) [460 P.2d 481] (rape, with rapes of two other victims); *In re Lara*, 1 Cal. 3d 486 (1969) [462 P.2d 380] (robbery); *In re Roberts*, 2 Cal. 3d 892 (1970) [471 P.2d 481] (robbery); *In re Saunders*, 2 Cal. 3d 1033 (1970) [472 P.2d 921] (robbery, second murder attempted).